Supreme Court, U.S.
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No. 01-1756

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In The

Supreme Court of the United States

REGAL FISH LTD.,

Petitioner,

v.

JEFFREY P. FISH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a seaman in an admiralty action recover pre-judgment interest on a damage award under the Jones Act, 46 U.S.C. App. § 688(a)?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding in the court of appeals appear in the caption of the case.

In the district court, there were additional defendants, all of whom were dismissed from the case at or before trial. None of them was a party to the proceeding in the court of appeals. The caption on the Ninth Circuit's opinion is erroneous to the extent that it suggests that some of the additional defendants were appellants.

In the district court, there was also a plaintiff-intervenor. The appeal did not affect its interests, and it was not a party to the proceeding in the court of appeals.

Petitioner has no parent corporation and no publicly held company owns 10% or more of petitioner's stock.

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OPINIONS BELOW

The opinion of the court of appeals has not been reported. It is reprinted as Appendix A ("App. A"), *infra*, at page A1.

Neither the district court's Findings of Fact and Conclusions of Law nor its Judgment has been reported. They are reprinted as Appendix B ("App. B"), *infra*, at page B1, and Appendix C ("App. C"), *infra*, at page C1, respectively.

The court of appeals' order denying petitioner's petition for rehearing has not been reported. It is reprinted as Appendix D ("App. D"), *infra*, at page D1.

JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit (App. A), which was dated and entered on July 30, 2001. On August 22, 2001, the Ninth Circuit denied a timely petition for rehearing. *See* App. D. This Petition for Writ of Certiorari is filed within 90 days of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1333(1) and 46 U.S.C. App. § 688(a).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. App. § 688(a), provides, in relevant part, as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT

The relevant facts are completely straightforward and no longer disputed. Respondent was employed as an assistant engineer/processor on petitioner's commercial fishing vessel when he "suffer[ed] personal injury in the course of his employment." *See* App. B at B2 (¶¶ 3, 4). He therefore filed the present admiralty action seeking damages for (1) negligence under the Jones Act, 46 U.S.C. App. § 688(a); (2) unseaworthiness under the general maritime law; and (3) maintenance and cure, also under the general maritime law. *See* App. A at A2.

The district court held that petitioner was liable to respondent under the Jones Act, and awarded substantial damages (subject to a 15% reduction in light of respondent's contributory negligence). App. B at B8-B9 (¶¶ 2, 4-8). On respondent's unseaworthiness claim, the district court – finding that the vessel was in fact seaworthy – held for the petitioner. *Id.* at B5 (¶ 14), B8 (¶ 3). Respondent did not file a cross-appeal to challenge this holding. On the maintenance and cure claim, the district court

held that respondent was entitled to maintenance payments. *Id.* at B7 (¶ 19(f)), B9 (¶ 5). Because of payments that petitioner made to respondent after the accident and before trial (for which petitioner received a credit), however, very little in additional damages was due for maintenance.[1]

Respondent claimed prejudgment interest on his damages. Petitioner argued to the district court that the Jones Act does not permit an award of prejudgment interest because it incorporates the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, by reference, and this Court has unequivocally held that prejudgment interest is not available under FELA. *See Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 336-339 (1988). The district court, without addressing petitioner's *Monessen* argument, awarded over $144,000 in prejudgment interest, *see* App. C at C2 (¶ 4), on the ground that, "[i]n admiralty cases, prejudgment interest must be awarded unless peculiar circumstances justify its denial." App. B at B9 (¶ 9).

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[1] Petitioner received credit for $170,000 in pre-trial payments. *See* App. B at B7-B8 (¶ 20). If the workers' compensation disability payments are first credited against the maintenance liability, then respondent's recovery for maintenance was less than $800. *See ibid.* (¶¶ 19-20). If the workers' compensation disability payments are first credited against the loss of past earnings, then respondent's recovery for maintenance was approximately $21,000. In either event, the Jones Act damages made up over 97% of the net damage award before prejudgment interest. Petitioner challenges the prejudgment interest only on the Jones Act damages.

On appeal, petitioner contended that (1) the damage award was excessive – an argument that is not raised in this petition, and (2) the Jones Act does not permit an award of prejudgment interest. The Ninth Circuit, without hearing oral argument, rejected each of these contentions in a single paragraph. *See* App. A. Like the district court, the Ninth Circuit did not address petitioner's *Monessen* argument. It instead considered existing circuit precedent to have settled that it "is the norm" for a "court sitting in admiralty" to "award[ ] prejudgment interest." App. A at A2.

Petitioner sought rehearing only on the prejudgment interest issue, once again relying on *Monessen*. The Ninth Circuit summarily denied the petition for rehearing. *See* App. D.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has applied the Jones Act in a manner that is flatly inconsistent with *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988). In the process, it has exacerbated two entrenched conflicts in the treatment of prejudgment interest under the Jones Act. A "jurisdictional" conflict has long existed in which many lower courts hold that the availability of prejudgment interest, which is a matter of substantive law, depends on the jurisdictional basis under which the court decides the case. And a "geographical" inter-circuit conflict, involving at least four federal circuits, concerns the availability of prejudgment interest under the Jones Act

for cases tried in admiralty. The question whether Congress intended the Jones Act to permit prejudgment interest is an important and recurring issue in the maritime industry. The present case offers an ideal vehicle for resolving that question.

I. THE NINTH CIRCUIT HAS IGNORED THIS COURT'S RELEVANT DECISIONS CONCERNING THE PROPER INTERPRETATION OF THE JONES ACT

The proper resolution of this case required nothing more than the application of a simple syllogism in which this Court has already addressed both of the premises supporting the conclusion. Unfortunately, the Ninth Circuit – in common with most of the lower courts – chose to rely on its own prior decisions rather than to apply this Court's teachings.

A. Prejudgment Interest Is Not Recoverable Under the Federal Employers Liability Act as a Matter of Substantive Law

In *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), an injured railroad employee recovered personal injury damages under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60. The trial court awarded prejudgment interest under a state procedural rule. On appeal, this Court unambiguously held (in a portion of the opinion joined by seven Justices) that prejudgment interest is not recoverable under FELA. 486 U.S. at 336-339. Moreover, the *Monessen* Court unanimously held that FELA's prejudgment interest rule

applies as a matter of substantive law. *Id.* at 335-336. It is therefore beyond dispute that prejudgment interest is not available under FELA, regardless of the forum in which the action is heard.

B. The Jones Act Incorporates the Federal Employers Liability Act, Including Judicial Interpretations, By Reference

The Jones Act provides that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in a seaman's personal injury action under the Act. 46 U.S.C. App. § 688(a). From the earliest days, this Court has recognized that the quoted language incorporates FELA into the Jones Act by reference. In its first Jones Act case, the Court explained:

> The reference, as is readily understood, is to [FELA] and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference.

Panama Railroad Co. v. Johnson, 264 U.S. 375, 391-392 (1924). *See also, e.g., Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 324 (1927); *Engel v. Davenport*, 271 U.S. 33, 35-36 (1926). More recent examples of the continued recognition that the Jones Act incorporates FELA include *American Dredging Co. v. Miller*, 510 U.S. 443, 455-456 (1994), and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990).

Because Congress intended to apply FELA's rules in Jones Act cases, it logically follows that the judicial interpretations of FELA also apply to the Jones Act.[2] As JUSTICE SCALIA wrote for the Court in *American Dredging*, "the Jones Act adopts 'the entire judicially developed doctrine of liability' under [FELA]." 510 U.S. at 456 (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958)). In *Miles*, JUSTICE O'CONNOR similarly explained that when Congress "incorporat[ed] FELA unaltered into the Jones Act" the judicial "gloss" on FELA was intended to be part of the package. 498 U.S. at 32.

There are many examples of this Court's applying an established interpretation of FELA when construing the Jones Act. Most recently, the *American Dredging* Court "th[ought] it evident that the rule which *Mayfield* announced for the FELA [regarding *forum non conveniens*]

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[2] An exception to this general rule can be made in the rare case when a FELA rule is logically limited to the railroad context or logically inapplicable in the maritime context. In *Cox v. Roth*, 348 U.S. 207 (1955), for example, the Court noted that FELA does not explicitly provide for the survival of actions against deceased tortfeasors. Such a provision would have been logically unnecessary in the railroad context. The *Cox* Court nevertheless held that the death of the employer would not defeat a Jones Act claim. *Id.* at 208-209. *See also The Arizona v. Anelich*, 298 U.S. 110, 123-124 (1936) (holding that the FELA assumption-of-the-risk rule tied to the railroad-specific Federal Safety Appliance Act does not apply under the Jones Act). This exception to the general rule is irrelevant here. Prejudgment interest is a theoretical possibility in any case in which monetary damages for past losses are awarded. The FELA rule denying prejudgment interest is neither logically limited to the railroad context nor logically inapplicable in the maritime context.

applies as well to the Jones Act." 510 U.S. at 456 (citing *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 5 (1950)). "The decisive question in" *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), was "whether the principles developed in [a] line of FELA cases" would be extended to the Jones Act or limited to the FELA context. 355 U.S. at 436. The *Kernan* Court held that the FELA principles should be extended to the Jones Act, notwithstanding a strong dissent arguing that the relevant FELA principles were logically limited to the railroad context. And in *Hopson v. Texaco*, 383 U.S. 262, 264 (1966) (per curiam), the Court confirmed that the broad definition of "agents" announced in *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 331-332 (1958), a FELA case, also applied under the Jones Act.

Because prejudgment interest "is part of the actual damages sought to be recovered," *Monessen*, 486 U.S. at 335, Jones Act decisions incorporating FELA's damages rules provide particularly relevant illustrations. In *Miles*, for example, this Court applied its FELA decision in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913), to "incorporate the pecuniary limitation on damages" from FELA into the Jones Act and hold that "[t]here is no recovery for loss of society in a Jones Act wrongful death action." 498 U.S. at 32. Similarly, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 156 (1964), the Court applied its FELA decision in *Chicago, Burlington & Quincy Railroad Co. v. Wells-Dickey Trust Co.*, 275 U.S. 161, 163 (1927), to define the beneficiaries to whom damages are payable under the Jones Act.

C. It Necessarily Follows that Prejudgment Interest Is Not Recoverable Under the Jones Act as a Matter of Substantive Law

By incorporating FELA and its judicial interpretations, the Jones Act adopts the *Monessen* rule precluding an award of prejudgment interest. Thus prejudgment interest is unavailable under the Jones Act as a matter of substantive law. The rule accordingly applies regardless of the forum in which the suit is brought. A plaintiff may not recover prejudgment interest on Jones Act damages in an action in admiralty, at law, or in a state court.

This Court's decision in *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189 (1995), does not undermine this conclusion with respect to actions in admiralty. On the contrary, *Milwaukee* strongly supports it. In holding that the general maritime law favors prejudgment interest in collision cases, the *Milwaukee* Court explained that Congress has not enacted a general prejudgment interest statute, *id.* at 194, and immediately cited *Monessen*. The clear implication was that when Congress enacts a statute providing a substantive law rule for prejudgment interest, as it did with FELA (and thus the Jones Act), the congressional rule prevails over "judge-made principles." The *Milwaukee* Court did not rely on the underlying basis for jurisdiction but on the governing substantive law. This is implicit not only in the citation of *Monessen* (which unanimously held that prejudgment interest is a matter of substantive law), but also in the *Milwaukee* Court's treatment of its conclusion as resting on "a general rule that prejudgment interest should be awarded in maritime collision cases," 515 U.S. at 195. Under this general rule, prejudgment interest would be

the norm even if a collision case were tried in state court or in a federal court sitting in diversity.

II. A WIDESPREAD CONFLICT EXISTS AMONG LOWER COURTS DEPENDING ON THE JURISDICTIONAL BASIS FOR THE SUIT

Not only does 28 U.S.C. § 1333(1) authorize a plaintiff to bring a maritime action in federal court on the so-called "admiralty side," the statute's "saving to suitors" clause also permits a plaintiff to bring almost any maritime action in any other court having jurisdiction. Other possible courts include a state court or a federal court on the so-called "law side" (*i.e.*, under federal question jurisdiction, 28 U.S.C. § 1331, or diversity jurisdiction, 28 U.S.C. § 1332). *See generally, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-13, at 37-40 (2d ed. 1975). Because the Jones Act itself provides a basis for federal question jurisdiction, *see, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Panama Railroad*, 264 U.S. at 383-384, a Jones Act plaintiff almost always has three jurisdictional choices: The injured seaman may sue in federal court on the admiralty side, as respondent did here, *see, e.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42-43 (1943); in federal court on the law side, *see, e.g., Romero*, 358 U.S. at 357; or in state court, *see, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243 & n.6 (1942).

Every court should apply the substantive provisions of the Jones Act in the same way, regardless of the jurisdictional basis that authorizes it to hear the case, *see infra* at 20-21, just as the federal courts in different circuits

should apply the statute uniformly, *see infra* at 18-19. When the courts in different circuits diverge in their interpretations of the Jones Act, there is an inter-circuit or "geographic" conflict that this Court may need to resolve. Similarly, when the courts apply the substantive provisions of the Jones Act differently according to the jurisdictional basis for the suit, there is a "jurisdictional" conflict. And when it has arisen in several circuits, only this Court is in a position to resolve it.

A. The Fifth Circuit

The Fifth Circuit appears to be the source of much of the confusion in this field. In the course of over a dozen reported opinions over more than thirty years, it has firmly developed a fundamental dichotomy: prejudgment interest may not be awarded on Jones Act damages in cases decided on the law side, but is available (subject to limited discretion) in cases decided in admiralty. This basic dichotomy has been recognized many times. *See, e.g., Martin v. Walk, Haydel & Associates*, 794 F.2d 209, 212 (CA5 1986) (per curiam); *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (CA5 1985); *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 340 (CA5 1972); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 972 (CA5 1969).

Several decisions have denied prejudgment interest because the district court was sitting on the "law side." *E.g., Boyle v. Pool Offshore Co.*, 893 F.2d 713, 719 (CA5 1990); *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 883 (CA5 1984); *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157, 1167-68 (CA5 1972); *Sanford Bros. Boats*, 412 F.2d at 972-973. Conversely, several decisions have

allowed an award of prejudgment interest because the district court was exercising admiralty jurisdiction. *E.g., Martin*, 794 F.2d at 212; *Williams*, 750 F.2d at 491; *Doucet*, 467 F.2d at 340.

This dichotomy has become confused at times as the Fifth Circuit has occasionally spoken of the issue turning on whether the case was tried to a jury. *See, e.g., Simeon v. T. Smith & Son*, 852 F.2d 1421, 1435 (CA5 1988) (per curiam), *cert. denied*, 490 U.S. 1106 (1989); *McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529, 532 n.1 (CA5 1987); *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 955-956 (CA5 1984). This confusion can be explained by the legal fact that admiralty cases are tried to the court, *see, e.g., Waring v. Clarke*, 46 U.S. (5 How.) 441, 459-460 (1847); FED. R. CIV. P. 38(e), and the empirical fact that Jones Act cases on the law side have traditionally been tried to the jury (as anticipated in the text of the Act itself). *See, e.g., Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1093-95 (CA5 1988) (discussing the prejudgment interest rule in a way that suggests that the jury-nonjury distinction is a surrogate for the law-admiralty dichotomy).

The dichotomy has also become complicated, as the Fifth Circuit has been forced to deal with peripheral issues such as shifting from the law side to the admiralty side in the middle of a case. *See, e.g., Martin*, 794 F.2d at 212; *Doucet*, 467 F.2d at 338-341. *See also infra* at 24-25 (discussing Fifth Circuit's treatment of unallocated damages in cases under the Jones Act and the general maritime law).

B. The First, Second, Fourth, Ninth, and Eleventh Circuits

Several other circuits have endorsed the Fifth Circuit's law-admiralty dichotomy, *see, e.g., Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 443 n.1 (CA1 1991), but not all of these courts have addressed the issue in both contexts.[3]

Some circuits have adopted half of the law-admiralty dichotomy, explicitly or implicitly leaving open the other half. *See, e.g., Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 592 (CA2 1961) (recognizing "that, at least at law, [prejudgment] interest is not allowed" under the Jones Act), *cert. denied*, 368 U.S. 989 (1962); *id.* at 593 n.13 ("not reach[ing] the question" in the admiralty context); *Gardner v. National Bulk Carriers, Inc.*, 333 F.2d 676, 677 (CA4 1964) (per curiam) (affirming "the discretionary allowance" of prejudgment interest "in a Jones Act case brought on the 'admiralty side' of the court").

The decisions in the Ninth Circuit appear to follow the Fifth Circuit's law-admiralty dichotomy. Indeed, the court below explicitly relied on *Williams*, 750 F.2d at 491, in which the Fifth Circuit restated and followed its law-admiralty dichotomy. *See* App. A at A2-A3. At the very

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[3] We have been unable to identify specific Eleventh Circuit precedent on point, but the Eleventh Circuit would be bound to follow the Fifth Circuit's approach because the law-admiralty dichotomy was already established before the creation of the Eleventh Circuit. *See Bonner v. Prichard*, 661 F.2d 1206, 1207 (CA11 1981) (en banc) (holding that the Eleventh Circuit is bound by decisions of the Fifth Circuit prior to October 1, 1981).

least, the Ninth Circuit clearly permits prejudgment interest if a Jones Act case is brought on the admiralty side. In addition to the decision below, earlier this year in *Simeonoff v. Hiner*, 249 F.3d 883 (CA9 2001), a Jones Act admiralty action, the court held that prejudgment interest was available and " 'must be granted unless peculiar circumstances justify its denial.' " *Id.* at 894 (quoting *Vance v. American Hawaii Cruises*, 789 F.2d 790, 795 (CA9 1986)). The court thus remanded the case for the district court to award prejudgment interest or justify its failure to do so. *See also, e.g., Vance*, 789 F.2d at 794-795 (Jones Act case in admiralty holding that prejudgment interest "must be granted" absent "peculiar circumstances"); *cf. Williamson v. Western Pacific Dredging Corp.*, 441 F.2d 65, 67 (CA9 1971) ("it may well be that prejudgment interest is available in a Jones Act case tried, as here, in admiralty") (citing Fifth Circuit and other authority), *cert. denied*, 404 U.S. 851 (1971).

C. State Courts

State courts have recognized that the availability of prejudgment interest under the Jones Act is a matter of federal substantive law. *See, e.g., Milstead v. Diamond M Offshore, Inc.*, 676 So.2d 89, 96 (La. 1996); *Militello v. Ann & Grace, Inc.*, 411 Mass. 22, 26 & n.4, 576 N.E.2d 675, 678 & n.4 (1991). But they have been inconsistent in their attempts to apply such a confused body of federal law.

The law-admiralty dichotomy should not have created difficulties for state courts because the federal court's exclusive admiralty jurisdiction necessarily means that they do not sit "in admiralty." But the Louisiana

Supreme Court, doing its best to follow Fifth Circuit precedent, has held that prejudgment interest is available on Jones Act damages in state bench trials but not when the case is tried to a state jury. *See Milstead*, 676 So.2d at 96-97. It is noteworthy that the *Milstead* court did not cite *Monessen*. An earlier Louisiana appellate court decision, however, had accepted the argument that because *Monessen*'s rule against prejudgment interest in FELA cases was "incorporated into the Jones Act, pre-judgment interest [was] not available in [a Jones Act] case." *Bridgett v. Odeco, Inc.*, 646 So.2d 1249, 1258 (La. App. 1994), *writ denied*, 651 So.2d 840 (La. 1995).

Unlike the federal courts, which have uniformly ignored *Monessen*, some intermediate state courts have recognized the relevance of *Monessen* and have applied this Court's analysis. These courts have consistently held that prejudgment interest is not available under the Jones Act. *See, e.g., Webster v. Oglebay Norton Co.*, 1995 Ohio App. LEXIS 238, at *19-*20 (Ohio App. 1995); *Bridgett*, 646 So.2d at 1258; *Tio Mario, Inc. v. Matos*, 778 S.W.2d 529, 532 (Tex. Civ. App. 1989).

III. THE FOURTH, FIFTH, AND NINTH CIRCUITS ARE IN CLEAR AND DIRECT CONFLICT WITH THE SIXTH CIRCUIT

As explained in Part II, *supra* at 11-14, at least the Fourth, Fifth, and Ninth Circuits[4] permit prejudgment interest in a Jones Act case tried in admiralty. *Cf. First National Bank of Chicago v. Material Service Corp.*, 597 F.2d

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[4] The Eleventh Circuit should presumably be on this list as well. *See supra* note 3.

1110, 1120-21 (CA7 1979) (recognizing in dicta that prejudgment interest is available under the Jones Act in admiralty actions).

The Sixth Circuit, in sharp contrast, has unequivocally held that prejudgment interest is not recoverable under the Jones Act, even in an admiralty action. The seminal decision in this line of cases is *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (CA6 1948), a Jones Act case on the admiralty side. The court recognized that the Jones Act incorporates FELA, *id.* at 624, and – anticipating *Monessen* by forty years – that "under [FELA], an award of [prejudgment] interest is not permitted," *id.* at 626. It therefore concluded that "[t]he same rule applies under the Jones Act." *Id.*

Having unambiguously announced this blanket rule, the Sixth Circuit has not been burdened by the flood of Jones Act prejudgment interest litigation that has plagued some of the other circuits. It has nevertheless had a few opportunities to confirm the continued vitality of *Cleveland Tankers* over the years. In *In re United States Steel Corp.*, 436 F.2d 1256 (CA6 1970), *cert. denied*, 402 U.S. 987 (1971), another Jones Act case tried in admiralty, the plaintiffs inexplicably had been awarded prejudgment interest below. The court of appeals resolved this issue with a single sentence: "Such an award of prejudgment interest was error." *Id.* at 1279 (citing *Cleveland Tankers*). In *Petersen v. Chesapeake & Ohio Railway Co.*, 784 F.2d 732 (CA6 1986), the plaintiff in a Jones Act case on the law side cross-appealed the denial of prejudgment interest. Relying on *Cleveland Tankers* and *United States Steel*, the court reiterated its blanket rule (with no reference to the source of federal jurisdiction) "that prejudgment interest

may not be awarded in a Jones Act case." 784 F.2d at 740. Since then, the Sixth Circuit has twice noted its well-established rule when deciding non-Jones Act cases, each time citing *Cleveland Tankers* with approval. *See Anderson v. Whittaker Corp.*, 894 F.2d 804, 808 (CA6 1990); *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 367 (CA6 1986), *cert. denied*, 479 U.S. 849 (1986).

In sum, petitioner would have prevailed on the pre-judgment interest issue if this case had been decided in the Sixth Circuit. The decision below is part of an entrenched inter-circuit conflict, with a long line of decisions on each side of the issue from both the Fifth and Sixth Circuits.

IV. THE INTER-CIRCUIT AND JURISDICTIONAL CONFLICTS CREATE SERIOUS PROBLEMS FOR THE MARITIME INDUSTRY

This Court is regularly called upon to resolve inter-circuit conflicts in statutory cases, and thus to maintain the uniformity of federal law. This concern with geographic conflicts has been evident in the Jones Act context from the beginning. *See, e.g., Panama Railroad*, 264 U.S. at 392. But the Court has focused even more energy on maintaining uniformity in the substantive application of the Jones Act regardless of the forum in which the case is heard. Indeed, the Court explicitly recognized this jurisdictional "uniformity requirement" as recently as *American Dredging*, 510 U.S. at 456 (citing *Garrett*, 317 U.S. at 244).

The decision below is part of a geographical inter-circuit conflict (involving at least four circuits) and of a jurisdictional conflict. Both of these conflicts promote forum shopping and undermine the uniformity that this Court has long sought to maintain in Jones Act cases.

A. The Inter-Circuit Conflict Undermines Uniformity and Encourages Forum Shopping

The impact of the inter-circuit conflict should be obvious from a map, for the bulk of the nation's coastline is affected. The Ninth Circuit covers the entire Pacific coast, including Alaska and Hawaii. The Fifth Circuit covers most of the Gulf coast (and the Eleventh Circuit, *see supra* note 3, covers the rest), including the mouth of the Mississippi River and most of the nation's off-shore energy production. The Sixth Circuit covers most of the Great Lakes coastline and significant river traffic on the Mississippi and Ohio Rivers. The Fourth Circuit (like the Eleventh Circuit, *see supra* note 3) covers a significant portion of the Atlantic coast. In sum, the circuits involved cover most of the cases decided under the Jones Act.

This Court has long been concerned with maintaining geographic uniformity in the application of the Jones Act. In *Panama Railroad*, 264 U.S. at 392, for example, the Court upheld the Act against Constitutional challenge in reliance on the argument that the new statute would operate uniformly throughout the country. This concern for geographic uniformity has remained a continuing theme in the Court's Jones Act jurisprudence. *See, e.g., Miles*, 498 U.S. at 29 ("the Jones Act establishes a uniform system of seamen's tort law"); *Garrett*, 317 U.S. at 244

("the Jones Act is to have a uniform application throughout the country"); *Engel*, 271 U.S. at 39 (noting importance of "uniform operation" of the Jones Act).

In addition to the usual concerns supporting uniformity (*e.g.*, ensuring that similarly situated seamen and maritime employers are treated in the same way, regardless of the forum), it is important to maintain uniformity to prevent forum shopping. Although the second sentence of the Jones Act appears to restrict venue[5] and thus make forum shopping more difficult, venue rules are procedural, *see, e.g., American Dredging*, 510 U.S. at 453, which means that they depend on the forum. In practice, plaintiffs have a very wide choice of venue in Jones Act cases.[6] Thus a seaman on a Mississippi River barge who sues brings a Jones Act suit in Memphis (in the Sixth Circuit) may not recover prejudgment interest, but if the seaman brings the action downstream in New Orleans (in

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[5] The Act appears to provide for venue in "the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C. App. § 688(a).

[6] Cases on the "law side" are controlled by 28 U.S.C. §§ 1391-1393, the normal venue rules for civil cases. *See, e.g., Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966). Cases on the "admiralty side" are subject to admiralty's wide-open venue rule under *In re Louisville Underwriters*, 134 U.S. 488 (1890) (suit is proper in any district within which process can be served or in which the defendant's property or credits can be attached), which has been implicitly confirmed by Rule 82 of the Federal Rules of Civil Procedure. *See, e.g., Brown v. C.D. Mallory & Co.*, 122 F.2d 98 (CA3 1941). Finally, Jones Act cases in state court are controlled by the venue rules of the forum state. *See, e.g., American Dredging*, 510 U.S. at 457; *Bainbridge v. Merchants & Miners Transportation Co.*, 287 U.S. 278, 280-281 (1932).

the Fifth Circuit) prejudgment interest will be available in admiralty. An Ohio River barge sailing between Pittsburgh and Cincinnati will spend most of its time on the border between the Fourth Circuit (which allows prejudgment interest in Jones Act admiralty cases) and the Sixth Circuit (which does not).

B. The Jurisdictional Conflict Undermines Uniformity and Encourages Forum Shopping

Because the "saving to suitors" clause generally gives a maritime plaintiff a choice of forums, it is particularly important to ensure that the same substantive rules apply regardless of the jurisdictional basis for hearing the suit. In the broader maritime context, this Court has recognized this principle – now known as the "reverse *Erie*" doctrine, *see, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223 (1986) – at least since *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). Thus in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-411 (1953), for example, this Court recognized that the same substantive law applies in all maritime cases, whether brought "in admiralty" or "on the law side." The *only* differences are those procedural issues spelled out in FED. R. CIV. P. 9(h). *See also, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

These general principles have been particularly important under the Jones Act. In its first Jones Act case, this Court summarily dismissed the suggestion that different rules would apply depending on whether the seaman sued on the law side or the admiralty side: "Such a

distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it." *Panama Railroad*, 264 U.S. at 391. In the intervening years, the Court has consistently recognized that the same substantive law applies in Jones Act cases regardless of the basis for federal jurisdiction. *See, e.g., McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958); *Garrett*, 317 U.S. at 244 & n.9; *Baltimore Steamship*, 274 U.S. at 324. Similarly, this Court has also long recognized that the same substantive law applies in Jones Act cases in state courts as in federal courts. *See, e.g., McAllister*, 357 U.S. at 224; *Garrett*, 317 U.S. at 243-244; *Engel*, 271 U.S. at 38-39. The *McAllister* Court, having decided the substantive rule that was to apply, summarized the rule concisely: "We think this is so whether the action is at law or in admiralty, in the state or the federal courts." 357 U.S. at 224.

This Court's long-standing desire to maintain uniformity in the substantive application of the Jones Act regardless of the forum reflects an important realistic concern. Geographical forum shopping is less common in Jones Act cases. Practical considerations provide some limit on a plaintiff's ability to choose among courts in different circuits. But there is no logistical impediment to "jurisdictional" forum shopping, and it happens all of the time. Choosing between the law and admiralty sides of federal court does not require a plaintiff to consider alternative travel plans; it does not even require a change of courtrooms. Choosing between state and federal court is almost as easy. Although it does require changing courthouses, in many cities that simply means crossing the street.

Whatever happens in this case, procedural differences will continue to motivate the plaintiff in the choice of forum. But a plaintiff should not be permitted to change the applicable substantive law by choosing a different forum. Not only would that be inconsistent with the line of Jones Act decisions cited in this section, it would fly in the face of the more general line of jurisprudence going back to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

V. THE DECISION BELOW CLEANLY RAISES AN IMPORTANT ISSUE THAT THIS COURT SHOULD RESOLVE

The availability of prejudgment interest under the Jones Act is an important issue that arises frequently and has a significant impact, both in the aggregate and individually in some circumstances. This case provides an ideal vehicle for resolving the question presented. The issue is ripe for review, and no purpose would be served in allowing further percolation.

A. The Availability of Prejudgment Interest Under the Jones Act is an Important Issue

The Jones Act is the central statute in the maritime tort field, *see, e.g., American Dredging*, 510 U.S. at 455, and thus it is litigated frequently. The Administrative Office of the Courts does not maintain statistics that are sufficiently detailed to determine just how frequently the Jones Act arises in practice. But some idea of the frequency of Jones Act litigation can be assessed simply by reviewing the number of annotations in West's *United*

States Code Annotated. The current main volume contains 625 *pages* of Jones Act annotations, while the 2001 pocket part has another 180 *pages* of Jones Act annotations.

In sum, there have been literally thousands of reported Jones Act cases and their digest summaries occupy over 800 pages of *United States Code Annotated*. The number of decided cases (including unreported cases) is obviously much higher, and the number of Jones Act cases filed (including cases that settled before a decision) would be higher still. An even greater number of potential Jones Act cases would have settled (based on expectations of the likely results in court) before suit was filed. Because time inevitably passes between the date of the accident and the entry of judgment (or other resolution of the dispute), the availability of prejudgment interest is an issue in every single one of these cases and potential cases.

Even if interest rates were to remain low and cases were to be decided quickly, with the result that prejudgment interest in any given case would be relatively small, the total sums at issue would still be substantial in the aggregate, simply because so many cases are involved. Unfortunately, interest rates have not always been low (and are unlikely to remain low forever), and many cases take years to resolve. Consider three cases that have come before this Court. In *Monessen*, prejudgment interest added over 20% to the plaintiff's damages. *See* 486 U.S. at 332. In the present case, prejudgment interest would also add approximately 20% to the relevant portion of the award. *City of Milwaukee*, 515 U.S. at 192, a collision case, offers a striking example of how significant the issue can be: The prevailing party "sought an award of over $5.3

million in prejudgment interest" on a damage award of less than $1.7 million. Other Jones Act cases also confirm how substantial prejudgment interest sums can be. *See, e.g., Borges*, 935 F.2d at 443-444 (reviewing an award of $438,009.81, including $96,516.36 in prejudgment interest); *McCrann v. United States Lines*, 803 F.2d 771, 773 (CA2 1986) (affirming an award of $420,044.39, including $168,387.39 in prejudgment interest).

B. The Decision Below Cleanly Presents the Prejudgment Interest Question, and Is Thus a Suitable Vehicle for Resolving This Important Issue

As this Court has recognized, "for practical reasons, a seaman will almost always combine in a single action claims for relief under the Jones Act and general maritime law." *American Dredging*, 510 U.S. at 457. Thus many damage awards are based not only on the Jones Act but also on the general maritime law, and it is difficult or impossible to distinguish between the two bases. *See, e.g., Domangue v. Penrod Drilling Co.*, 748 F.2d 999, 1001 n.1 (CA5 1984) (per curiam); *Wyatt*, 735 F.2d at 956.

The inability to distinguish between Jones Act damages and general maritime law damages has created particular problems in the prejudgment interest context. Lower courts sitting on the law side have denied prejudgment interest on Jones Act damages but recognized the availability of prejudgment interest on general maritime law damages. An acknowledged inter-circuit conflict has arisen on how to handle cases in which damages have not been apportioned between these two bases. *Compare Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 378 (CA5 1989)

(prejudgment interest may not be awarded on the general maritime law damages unless the damages have been apportioned); *McPhillamy*, 810 F.2d at 531-532 (same); *Wyatt*, 735 F.2d at 955-956 (same); *Petersen*, 784 F.2d at 741 (adopting Fifth Circuit rule), *with Magee v. United States Lines*, 976 F.2d 821, 822-823 (CA2 1992) (explicitly rejecting *Colburn* and *Petersen* to award prejudgment interest on the general maritime law damages without apportionment).

Although the respondent here also combined claims for relief under the Jones Act and general maritime law, his unseaworthiness claim failed at trial and his maintenance award was largely offset by the credit that petitioner received for payments that it made prior to the lawsuit.[7] As a result, the sole issue at this stage of the proceedings is whether prejudgment interest is available under the Jones Act. This case therefore offers an ideal vehicle for the Court to resolve the Jones Act issue, without the distraction of considering the separate issue of whether prejudgment interest might be available on a seaman's personal injury damages under the general maritime law.[8]

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[7] *See supra* note 1.

[8] In petitioner's view, prejudgment interest should not be available on a seaman's personal injury damages under the general maritime law precisely because it is not available under the Jones Act. An admiralty court should not be permitted to go beyond the limits that Congress has set in the analogous statute. *See generally Miles*, 498 U.S. at 24. But the Court need not address this issue in the present case.

More generally, it is common for a prejudgment interest issue worth litigating to arise in conjunction with other issues that must also be considered,[9] and which might prevent the Court from reaching the prejudgment interest issue. *See, e.g., Simeonoff*, 249 F.3d at 886 (summarizing three other issues raised on appeal); *Borges*, 935 F.2d at 438 (summarizing three other issues raised on appeal); *Petersen*, 784 F.2d at 736-739 (discussing the requirements for admiralty jurisdiction, whether the plaintiff qualified as a "seaman" under the Jones Act, and two other substantial issues in addition to prejudgment interest). Once again, this case offers an ideal vehicle because it cleanly raises only the prejudgment interest issue.

The availability of prejudgment interest is an issue in every Jones Act case, and substantial sums are at issue both in individual cases and in the aggregate. But this is the rare appellate case under the Jones Act alone that presents only a prejudgment interest question. It is thus a particularly suitable vehicle for resolving this important issue. Although the issue will continue to create problems until this Court acts to resolve the conflicts, future cases coming to this Court are less likely to present the issue so cleanly.

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[9] Even *Monessen* raised a second issue that was independent of the prejudgment interest question. *See* 486 U.S. at 339-342.

C. The Issue Is Ripe for Review

A clear and direct conflict between the Fifth and Sixth Circuits on this issue has existed for almost thirty years, and between the Fourth and Sixth Circuits for over thirty-five years. The lower courts should have recognized that *Monessen* provides the necessary guidance to resolve the conflict, but for thirteen years they have ignored *Monessen*'s message. There is no point in permitting any further percolation on this issue. As the post-*Monessen* decisions show, the lower courts are simply adhering to pre-existing circuit approaches in preference to following this Court's teachings. Indeed, the present case amply demonstrates the futility of further percolation. Petitioner stressed the relevance of *Monessen* before the district court, on appeal, and on petition for rehearing. *See supra* at 3-4. The lower courts declined to discuss *Monessen*, instead relying on prior circuit precedent. This issue is ripe for review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 20, 2001

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY P. FISH, Plaintiff-Appellee, v. REGAL BALLYHOO INC., a Washington Corporation, owner/ operator of the M/V Storfjord; STORFJORD M/V; KARM ENTERPRISES INC.; REGAL FISH LTD., dba Storfjord & Owners, Defendants-Appellants. and OBAN INC.; OREKO TRADING, INC., Defendants, v. FREMONT INDUSTRIAL INDEMNITY'S, Plaintiff-Intervenor.	No. 00-35080 D.C. No. CV-98-00830-TSZ **MEMORANDUM*** (Filed July 30, 2001)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Submitted July 13, 2001**
Seattle, Washington

Before: ALARCON, FERNANDEZ, and TASHIMA, Circuit Judges.

Jeffrey P. Fish brought this action in admiralty against Regal Fish Ltd., and sought damages for maintenance and cure, unseaworthiness, and negligence under the Jones Act. The district court found in his favor and Regal appealed. We affirm.

(1) Regal first attacks the amount of the damage award as excessive. We have reviewed the record and disagree. Fish sustained grievous injuries which were painful, frightening and dispiriting. They have left him blind in one eye, and with much-impaired, hazy vision in the other. We simply cannot say that the amount of the award was so implausible as to be clearly erroneous. *See Simeonoff v. Hiner*, 249 F.3d 883, 893 (9th Cir. 2001); *Vance v. Am. Haw. Cruises, Inc.*, 789 F.2d 790, 793 (9th Cir. 1986). It surely does not shock our conscience, nor is it suggestive of passion or prejudice. *See Id.*

(2) Regal also complains that the court sitting in admiralty awarded prejudgment interest. But that is the norm. *See Simeonoff*, 249 F.3d at 894; *Vance*, 789 F.2d at 794-95; *see also Williams v. Reading & Bates Drilling Co.*, 750

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

F.2d 487, 491 (5th Cir. 1985); *Hillier v. S. Towing Co.*, 740 F.2d 583, 584 (7th Cir. 1984). The district court did not err.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY P. FISH, Plaintiff, v. REGAL FISH LTD., doing business as STORFJORD and owners, owners and operators of the M/V STORFJORD, Defendants.	IN ADMIRALTY NO. C98-830Z FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Nov. 24, 1999)

This matter came on for trial on November 15, 1999, before the undersigned Court, sitting without a jury. Plaintiff appeared through his attorneys of record, Harold F. Vhugen and Lance E. Palmer of Levinson, Friedman, Vhugen, Duggan & Bland, and defendants appeared through their attorney of record, Michael A. Barcott of Holmes, Weddle & Barcott. At the conclusion of trial the Court took the matter under advisement. The Court having considered the evidence and the arguments of counsel, now makes the following Findings of Fact:

I.

FINDINGS OF FACT

1. Plaintiff was employed by defendants Regal Fish Ltd. as a seaman for a period of about 6 weeks before July 15, 1996.

2. On or about July 15, 1996, defendant Regal Fish Ltd. modified plaintiff's status and entered into a crew agreement hiring plaintiff as an assistant engineer/processor on board the M/V Storfjord. *See* Exhibit 1.

3. At all times material after July 15, 1996, plaintiff worked for defendants as the assistant engineer/processor on the M/V Storfjord in the course of his employment as a seaman.

4. On July 19, 1996, as a result of an accident that gave rise to this litigation, plaintiff sustained a traumatic injury to his eyes, resulting in the ultimate loss of his right eye and partial loss of sight in his left eye. At the time of the accident, plaintiff was acting in the course of his employment with defendants. Pretrial order admitted fact 1.

5. On July 19, 1996, defendants Regal Fish Ltd. and Storfjord and Owners were the owners/operators of the M/V Storfjord. Pretrial order admitted fact 2.

6. The accident in question occurred in the late afternoon of July 19, 1996, when plaintiff attempted to remove a plug from a fill valve of an ammonia refrigeration system on the M/V Storfjord. A schematic of the fill valve is shown on exhibit A-6. The system had been partially filled with anhydrous ammonia earlier that day. Plaintiff had observed some of the procedures followed by the ammonia supplier during the morning filling, but did not observe the removal of the plug in question. Exhibit 6 are photos of the subject fill valve and plug assembly. In the late afternoon, Lars Myrfors, the vessel's manager of technical operation, directed plaintiff to complete the filling of the refrigeration system with ammonia. Plaintiff

agreed to perform the task and began the process of removing the plug from the fill valve assembly using a wrench. This was the first time the plaintiff had ever worked with the fill valve or plug. Unknown to the plaintiff, ammonia had accumulated between the fill valve and the plug under pressure. Although the parties' experts disagree as to whether the trapped ammonia was in gas or liquid form, the experts do agree that the trapped ammonia was under pressure of between 100 psi and 125 psi. As plaintiff attempted to remove the plug, the trapped ammonia caused the plug to be expelled under pressure and caused pressurized anhydrous ammonia to be sprayed into plaintiff's eyes.

7. Anhydrous ammonia is a dangerous controlled substance that the State of Washington classifies as one of several "toxic and reactive highly hazardous chemicals which present a potential for a catastrophic event" if inadvertently released. WAC 296-67-285. When trapped in a confined space anhydrous ammonia expands under pressure and is extremely dangerous.

8. Lars Myrfors, one of plaintiff's supervisors at the time of the accident, testified that he had removed similar plugs on other ammonia refrigeration systems a couple of dozen times, that he knew ammonia sometimes accumulated under pressure between the fill valve and the plug, and that there was a special procedure for removing the plug. He explained that if the plug appeared difficult to remove, this would indicate a build-up of pressure behind the plug, and the plug should be removed slowly, allowing the ammonia to "vent" around the larger threads of the plug and to then "wiggle" the plug to eliminate any remaining pressure before removing the

plug. Myrfors had personally experienced trapped ammonia in other ammonia systems a couple of times prior to the accident.

9. Prior to the accident, Myrfors knew that plaintiff had no prior experience with an ammonia refrigeration system. Prior to the accident, plaintiff had never seen the plug in question. Prior to the accident, defendants did not instruct or otherwise train plaintiff in the procedures to be followed for removing the plug from the valve. Specifically, no one told plaintiff of the possible build-up of ammonia, the hazards such a build-up would present, or the proper procedures to remove the plug.

10. Prior to the accident, plaintiff had worked in the automotive repair industry and had worked with Freon in an automotive air conditioning system. The Court finds that a Freon air-conditioning system uses about a cup of Freon as compared to the subject ammonia refrigeration system which contains up to 4-5000 lbs. of ammonia. The Court concludes that the two systems are substantially different, although some of the characteristics are similar. As reflected in plaintiff's statement on August 1, 1996, about 11 days after the accident while plaintiff was still hospitalized, exhibit A-3, page 44, plaintiff knew or "thought it [the ammonia] would leak" but "there was so much pressure, it just blew." Plaintiff testified he tested the valve three times, attempting without success to turn the valve clockwise to be sure it was fully closed. Only then did plaintiff attempt to remove the plug.

11. At the time of the accident, plaintiff had safety glasses on the top of his head but did not place them over

his eyes. Safety glasses could have resulted in some less injury but would not have prevented serious injury to plaintiff's eyes. At the time of the accident plaintiff was wearing a small cloth mask over his mouth and nose.

12. Prior to the accident, Lars Myrfors had purchased a hooded respirator device which he placed in the general vicinity of plaintiff. Myrfors told plaintiff the respirator device was available but did not instruct plaintiff to wear the device. Plaintiff denies being alerted to the availability of the device and did not use the device.

13. At the time of the accident, plaintiff knew that he had never filled an ammonia refrigeration system before but proceeded to attempt to accomplish the task when instructed to do so. Plaintiff was ordered to do the task but was not instructed on the method or procedures to accomplish the task.

14. The ammonia fill valve in question was not manufactured or sold with a plug. Mr. David Angevine, an expert in refrigeration equipment, testified that it is customary in the fishing industry for a plug to be purchased separately and inserted in the open end of the fill valve. Plaintiff contends that the use of the plug itself created an unsafe condition causing the vessel to be unseaworthy. The Court rejects this contention and finds that the vessel did not become unseaworthy because the plug was used in connection with the fill valve.

15. Defendants were negligent in failing to instruct plaintiff as to the proper procedures to be followed when working with the ammonia refrigeration system and in failing to warn plaintiff as to the potentially hazardous condition that may have existed.

16. The plaintiff was comparatively negligent in proceeding to work on the ammonia refrigeration system without knowing how to properly proceed and in failing to wear safety glasses, and such negligence partially caused his injuries. Plaintiff was 15% comparatively at fault for his injuries.

17. The negligence of the defendants proximately caused plaintiff to sustain a traumatic injury to his eyes, resulting in loss of his right eye after ten surgeries, and serious impairment of vision and partial loss of sight in his left eye, resulting in the ongoing need for medical care and monitoring. In summary, plaintiff suffered a severe alkali burn to his right eye which ultimately required corneal transplantation. The left eye also suffered alkali damage, has some anterior haze, and three to four "floating bodies" resulting in some loss of vision. Doctor Ada S. Wakil, plaintiff's principal treating physician, testified by deposition that plaintiff suffered pain in both eyes, headaches in the forehead and temples, severe pain to the point of nausea and vomiting, inability to sleep, and double images on the left eye during treatment. Exhibit 10 summarizes the various operations and other treatment provided to plaintiff. Plaintiff reached maximum cure January 4, 1999.

18. Plaintiff has suffered significant pain and stress as a result of his injuries, which have affected him psychologically, functionally, and vocationally. Doctor Wakil testified that plaintiff has suffered permanent damage and injuries including the loss of his right eye requiring the use of a prosthesis and some disfiguring of the face, and resulting psychological change as a result of the loss, a dry eye condition in both eyes which requires daily

lubrication and effects [sic] his ability to read for long periods, loss of depth perception affecting his ability to drive, decreased vision in his remaining left eye with scarring of the left eye cornea. Plaintiff's present vision in the left eye is 20/40 correctable close up to 20/20, but with some very early cataract in his left eye. Doctor Wakil described the injury to the remaining left eye as "a significant injury." Dep. page 78.

19. As a result of the accident, plaintiff incurred the following special damages:

(a) Loss of past earnings of $66,500;

(b) Loss of future earnings of $56,500;

(c) Cost for vocational training of $6,000;

(d) Reasonable and necessary past medical costs for treatment in the amount of $89,156.56;

(e) Reasonable and necessary future medical costs in the amount of $16,155;

(f) Maintenance from July 19, 1996, through January 4, 1999, a total of 886 days at $40.00/day or $35,440. Plaintiff is not entitled to any maintenance after January 4, 1999.

The special damages total $269,751.56.

20. The defendants made payments to the plaintiff for time loss, wage loss and medical benefits both directly and through its Longshore and Harbor Workers Compensation Act carrier during the course of his recuperation and defendants are entitled to a credit for all amounts paid against the amounts awarded herein. Defendants

provided wage continuation payments to plaintiff and are entitled to a credit of $46,198.60. Plaintiff also received LHWCA medical benefits of $89,156.56 and disability benefits of $34,644.56. Defendants are entitled to credits for those amounts in total amount of $123,801.12. This is without prejudice as to whether and to what extent defendants must reimburse third parties, including intervener Fremont/Industrial Indemnity.

21. Plaintiff was 38 years old on July 19, 1996, at which time he had a normal life expectancy of 38.2 years.

22. Plaintiff is entitled to recover general damages, past and future in the amount of $900,000.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

II.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties under 46 U.S.C. § 688, et seq., general admiralty law, and Rule 9(h) of the Federal Rules of Civil Procedure.

2. Defendants are liable to plaintiff, under the Jones Act, for the injuries plaintiff sustained to both eyes on July 19, 1996, while he was in the course of his employment as a seaman on the M/V Storfjord.

3. The M/V Storfjord was seaworthy on July 19, 1996.

4. Defendants' negligence caused plaintiff's injuries. Plaintiff was also 15% contributorially negligent. Plaintiff was told to fill the system with ammonia but given no instruction on how to perform the task. Under these

circumstances, plaintiff can be held comparatively negligent. *Alholm v. American S.S. Co.*, 144 F.3d 1172, 1179 (8th Cir. 1998); *Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193, 1196 (6th Cir. 1980). *See also Matter of Gudjonsson*, 500 F.Supp. 78 (W.D. Wash. 1980).

5. Plaintiff is entitled to an award for special damages, past and future, in the amount of $269,751.56.

6. Plaintiff is entitled to an award of general damages, past and future, in the amount of $900,000, of which the Court allocates eighty percent (80%) to past damages.

7. Defendants are entitled to credits against the above awards as set forth in Finding of Fact 20.

8. The award of special damages set forth in Findings of Fact 19(a)-(e) and general damages should be reduced by 15% to account for plaintiff's comparative fault.

9. In admiralty cases, prejudgment interest must be awarded unless peculiar circumstances justify its denial. *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 795 (9th Cir. 1986). *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), does not require a different result. There are no peculiar circumstances that would preclude an award of prejudgment interest on the amount of the judgment except for the future loss of income and any award for future pain and suffering and disability. Federal law governs the plaintiff's entitlement to prejudgment interest in a case tried in admiralty. *Columbia Brick Works, Inc. v. Royal Ins. Co.*, 768 F.2d 1066, 1070 (9th Cir. 1985). Normally, the interest rate prescribed for post-judgment interest in 28 U.S.C. § 1961(a) is applied unless the equities of the case demand a different rate. *See Western Pacific*

Fisheries, Inc. v. S.S. President Grant, 730 F.2d 1280, 1289 (9th Cir. 1984). That rate results in a rate of 5.471%. A court may choose a local rate of interest, if the equities demand. *Columbia Brick Works, Inc.*, 768 F.2d at 1071. The Court finds no justification to apply a rate different than the federal statutory rate of interest. Interest should be assessed from the date of injury to the conclusion of trial. *Vance* 789 F.2d at 794. The interest on the damage award should be compounded annually. *Stoddard v. Ling-Temco-Vought, Inc.*, 513 F.Supp. 314, 331 (C.D. Cal. 1980). Plaintiff should be awarded interest on (a) loss of past earnings of $66,500, (b) maintenance of $35,440, and (c) 80% of general damages compounded annually. The Court awards no interest on past medical costs of $89,156.56 because defendants would otherwise be entitled to the same amount of interest in connection with the credit.

10. Plaintiff is entitled to recover taxable costs.

11. Plaintiff is directed to serve and file a proposed judgment by December 3, 1999. Defendants should serve and file any objections to the proposed judgment by December 10, 1999. The Court will thereafter enter judgment in accordance with these Findings of Fact and Conclusions of Law.

DATED this 24th day of November, 1999.

/s/ Thomas S. Zilly
THOMAS S. ZILLY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

JEFFREY P. FISH, Plaintiff, v. REGAL FISH LTD., doing business as STORFJORD AND OWNERS, owners/ operators of the M/V STORFJORD, Defendant.	IN ADMIRALTY NO. C98-0830Z JUDGMENT (Filed Dec. 17, 1999)

This matter came on for trial on November 15 and November 16, 1999, before the undersigned Court, sitting without a jury. Plaintiff appeared through his attorneys of record, Harold F. Vhugen and Lance E. Palmer of Levinson, Friedman, Vhugen, Duggan & Bland, and defendants appeared through their attorney of record, Michael A. Barcott of Holmes, Weddle & Barcott. The Court having considered the evidence and the argument of counse, [sic] and having entered Findings of Fact and Conclusions of Law on November 24, 1999,

NOW ENTERS JUDGMENT in favor of plaintiff and against defendants and makes the following awards:

1. Special damages of $269,751.56 to plaintiff;
2. General damages of $900,000 to plaintiff,
3. Special damages of $234,311.56 and general damages of $900,000 are reduced by 15% for plaintiff's comparative negligence, a reduction of $170,146.72 from the awards to plaintiff.

4. Plaintiff is entitled to prejudgment interest on net past lost earnings of $66,500, and net maintenance of $35,440 (less the $80,843.46 paid by defendants) and on past general damages which the Court allocates to be 80% of general damages, or the sum of $720,000, the total of which is $741,096.84, at the rate of 5.471% from the date of injury in July 19, 1996 to the conclusion of trial on November 16, 1999, compounded annually. The amount of prejudgment interest is $144,051.99.
5. Defendants are entitled to a credit of $46,198.60 for providing wage continuation to plaintiff.
6. Defendants are entitled to a credit of $123,801.12 for LHWCA, representing medical benefits of $89,156.56 and disability benefits of $34,644.56 received by or on behalf of plaintiff, without prejudice as to whether and to what extent defendants must reimburse third parties, including intervener Fremont/Industrial Indemnity.
7. Plaintiff is entitled to recover his taxable costs.
8. Intervenor Fremont/Industrial Indemnity may file post-trial motions or other such proceedings to determine the rights and liabilities of Fremont and the defendants with regard to repayment of the workers' compensation benefits which have been paid by Fremont/Industrial Indemnity.

DATED this 16th day of December, 1999.

/s/ Thomas S. Zilly
THE HONORABLE THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jeffrey P. Fish, Plaintiff-Appellee, v. REGAL BALLYHOO INC., a Washington Corporation, owner/operator of the M/V Storfjord; STORFJORD M/V; KARM ENTERPRISES INC.; REGAL FISH LTD., dba Storfjord & Owners, Defendants-Appellants. and OBAN INC.; OREKO TRADING, INC., Defendants, v. FREMONT INDUSTRIAL INDEMNITY'S, Plaintiff-Intervenor.	No. 00-35080 D.C. No. CV-98-00830-TSZ ORDER DENYING PETITION FOR REHEARING (Filed Aug. 22, 2001)

Before: ALARCON, FERNANDEZ, and TASHIMA, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing is DENIED.

Supreme Court, U.S.
FILED
DEC 13 2001
CLERK

No. 01-756

In The
Supreme Court of the United States

REGAL FISH LTD., PETITIONER

v.

JEFFREY P. FISH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY CLUBS, AMERICAN INSTITUTE OF MARINE UNDERWRITERS, THE CHAMBER OF SHIPPING OF AMERICA AND THE INTERNATIONAL COUNCIL OF CRUISE LINES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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26 pp

QUESTION PRESENTED

Whether an injured seaman may recover prejudgment interest on a damages award under the Jones Act, 46 U.S.C. App. § 688(a), even though this Court has held that the Jones Act incorporates the substantive law of the Federal Employers' Liability Act, which this Court held in *Monessen Southwestern Railway Co.* v. *Morgan*, 486 U.S. 330 (1988), does not permit courts to award prejudgment interest.

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INTEREST OF THE AMICI CURIAE[1]

The International Group of Protection and Indemnity Clubs (the P&I Clubs) consists of nonprofit, mutual insurance companies which insure the liabilities of their shipowner members. Together, the P&I Clubs insure the liabilities of over 95% of the world's ocean-going merchant fleet, including virtually all oil tankers and dry cargo ships trading to the United States. The P&I Clubs are linked by reinsurance arrangements covering the larger liability risks of shipowners throughout the United States and the rest of the world. See generally G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 76 (2d ed. 1975). They actively participate in handling claims for their shipowner members, including the appointment of lawyers, surveyors, and other experts, and the expeditious settlement of claims of all types, including those by seaman seeking recovery under the Jones Act, 46 U.S.C. App. § 688(a). Over the years, the P&I Clubs have participated as *amici curiae* in cases before this Court, most recently *United States* v. *Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corporation* v. *Calhoun*, 516 U.S. 201 (1996); and *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 529 (1995).

The Chamber of Shipping of America represents twenty-one U.S.-based companies that own, operate, or charter ocean-going tankers, container ships, and other merchant vessels engaged in both domestic and

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[1] Pursuant to this Court's Rule 37.6, undersigned counsel represents that no counsel for any party had any role in authoring this brief, and no persons or entities other than the *amici curiae* made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

international trade. The Chamber also represents other entities that maintain a commercial interest in the operation of such ocean-going vessels. As a member of the International Chamber of Shipping, the Chamber participated as *amicus curiae* in *United States* v. *Locke*, *supra*.

The American Institute of Marine Underwriters (AIMU) has over a century of service as the trade association representing the marine insurance industry as an advocate, educator, and center for education. The AIMU represents approximately 90 percent of the commercial marine insurance companies in the United States. It routinely participates in a broad array of advocacy forums before lawmakers, regulators, and international bodies. AIMU has participated as *amicus curiae* in *California* v. *Deep Sea Research*, 523 U.S. 491 (1998); *Argentine Republic* v. *Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989); and *M/V Sky Reefer*, *supra*.

The International Council of Cruise Lines is a domestic non-profit membership association that includes the largest passenger cruise lines operating in excess of eighty vessels that call on hundreds of ports in the United States and abroad. ICCL members employ thousands of seamen and call on major U.S. ports in Florida, Alaska, California, Louisiana, New York, Texas, and Massachusetts. Those ports are in States within the geographical boundaries of the courts of appeals that conflict over whether the Jones Act permits prejudgment interest. The ICCL has participated as *amicus curiae* in cases at the certiorari stage in this Court. A precursor to the ICCL, the International Committee of Passenger Lines, participated as *amicus curiae* in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991).

Together, the *amici* represent a substantial portion of

the insurance-related and shipowning interests that pay claims to injured seamen under the Jones Act. As such, they have a vital interest in the proper construction of that Act.

STATEMENT

Respondent was injured during the course of his employment on a fishing vessel owned and operated by petitioner. He subsequently filed this admiralty action in federal district court, seeking personal injury damages under the Jones Act, 46 U.S.C. App. § 688(a), damages for unseaworthiness under the general maritime law, and maintenance and cure under the general maritime law.

The district court rendered a split judgment. Pet. App. B8-B9. The court upheld respondent's claim for damages under the Jones Act, awarding substantial damages (subject to a 15 percent reduction for respondent's contributory negligence). *Id.* at B7-B8. The court, however, rejected respondent's claim that the vessel was unseaworthy under the general maritime law, rendering judgment for petitioner on that issue. *Id.* at B8. The court held that petitioner was liable for maintenance and cure payments to respondent, virtually all of which had been paid to respondent prior to trial. *Id.* at B9.

Respondent moved for an award of prejudgment interest on the entire award, the damages under the Jones Act and the maintenance and cure under the general maritime law. Petitioner opposed that motion in substantial part, arguing that prejudgment interest was not available under the Jones Act, because of this Court's holdings that the Jones Act incorporates the substantive law of the Federal Employers' Liability Act (FELA) and that FELA does not authorize courts to

award prejudgment interest. See *Monessen Southwestern Railway Co.* v. *Morgan*, 486 U.S. 330, 336-339 (1988). Without citing or discussing *Monessen*, the district court awarded in excess of $144,000 in prejudgment interest. Pet. App. B9 (calculation based on award of damages). The court opined that, "[i]n admiralty cases, prejudgment interest must be awarded unless peculiar circumstances justify its denial." *Ibid.*

Petitioner appealed on the issues whether the damages award was excessive and whether the Jones Act authorized prejudgment interest. Respondent did not cross-appeal the district court's judgment that petitioner's vessel was seaworthy. The court of appeals rejected petitioner's contentions, holding that the award was not excessive and that it is "the norm" for a "court sitting in admiralty" to "award[] prejudgment interest." Pet. App. A2. The court did not address the applicability of *Monessen* to whether the Jones Act, properly construed, authorizes courts to award prejudgment interest. *Ibid.* Rather, it treated the matter as settled law under existing circuit precedent, citing *Simeonoff* v. *Hiner*, 249 F.3d 883, 894 (9th Cir. 2001), and *Vance* v. *American Hawaii Cruises, Inc.*, 789 F.2d 790, 794-795 (9th Cir. 1986). Pet. App. A2.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision incorrectly construes the Jones Act contrary to the manner dictated by this Court in *Monessen Southwestern Railway Co.* v. *Morgan*, 486 U.S. 330 (1988). In so doing, the court's holding deepens the disagreements among federal and state courts over whether the Jones Act authorizes courts to award prejudgment interest. By resolving the issue presented, the Court's decision would also bring clarity to related questions that have also divided the courts of appeals.

The question whether Congress intended in the passage of the Jones Act for prejudgment interest to be awarded is recurring and of enormous financial importance to the maritime industry.

I. THE COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH *MONESSEN*

A. The Jones Act incorporates the substantive law of FELA

1. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may * * * maintain an action for damages at law, * * * and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. App. § 688(a). In its very first case construing the Jones Act, this Court held that this language refers to the FELA "and its amendments" and that Congress intended that language as "a recognized mode of incorporating one statute or system of statutes into another," thereby serving "to bring into the latter all that is fairly covered by the reference." *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375, 391-392 (1924).

2. This Court's subsequent decisions confirm that Congress intended for the Jones Act to be construed to incorporate judicial decisions interpreting FELA. As the Court has explained, the Jones Act "adopts the entire judicially developed doctrine of liability under the Federal Employers' Liability Act (FELA)." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (quotation omitted).

The Court's decisions also establish that this incorporation is to be neutrally applied: if Congress intended for FELA to be construed to incorporate a legal

principle, then that principle also applies in Jones Act cases; but if FELA does not incorporate that principle, it is not incorporated into the Jones Act. Thus, this Court has confirmed that "[t]he Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429 (1958). The Court has also held that "the Jones Act – which in terms incorporates the provisions of the FELA – permits recovery for the death of a seaman resulting from a violation of a statutory duty." *Id.* at 431. See also *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (stating that "the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA").

Conversely, when the FELA has *not* been construed to incorporate a judicial doctrine, as in the case of *forum non conveniens*, this Court has held that an action filed under the Jones Act also does not incorporate that principle. See *American Dredging*, 510 U.S. at 456 (holding that, because a state court is free under FELA "to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law," the same rule should apply to Jones Act suits).

B. Prejudgment interest is not permitted under FELA

In *Monessen*, this Court squarely addressed "whether state courts may award prejudgment interest pursuant to local practice in actions brought under the FELA." 486 U.S. at 334. In holding that FELA does *not* authorize awards of prejudgment interest, the Court reasoned as follows. First, the Court explained that courts "are required to apply federal substantive law in adjudicating FELA claims." *Id.* at 335. The Court then

reasoned that the correct measure of damages is "'inseparably connected with the right of action,' and therefore is an issue of substance that 'must be settled according to general principles of law as administered in the Federal courts.'" *Ibid.* (quoting *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485, 491 (1916)). Third, the Court concluded that prejudgment interest is properly considered "part of the actual damages sought to be recovered." *Ibid.* The Court rejected the notion that a rule of procedure could trump the application of substantive federal statutory law in determining the availability of prejudgment interest. *Id.* at 335-336.

The Court then analyzed whether Congress intended for courts to award prejudgment interest under FELA. 486 U.S. at 336-339. The Court noted that FELA was silent on the question of prejudgment interest, *id.* at 336-337, but explained that "a sufficiently clear indication of legislative intent" emerged from "Congress' silence on this matter in the appropriate historical context," *id.* at 337. The Court found that "[i]n 1908, when Congress enacted the FELA, the common law did not allow prejudgment interest in suits for personal injury or wrongful death." *Ibid.* (collecting cases and treatise authorities). The Court concluded, therefore, that "[i]f prejudgment interest is to be available under the FELA, then Congress must expressly so provide." *Id.* at 339.

C. There is no sound reason to construe the Jones Act differently than FELA with respect to prejudgment interest

1. Except when the maritime context otherwise dictates, Congress intended for injured seamen to receive the same types of remedies as injured rail workers. See *Kernan*, 355 U.S. at 439 (incorporating FELA into the

Jones Act to hold that an employer's violation of a statutory duty will give rise to liability to an injured seaman because "[t]he deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery in the line of cases we have discussed"). "[T]he Jones Act establishes a uniform system of seaman's tort law parallel to that available to employees of interstate railway carriers under FELA." *Miles*, 498 U.S. at 29.

2. This Court has emphasized that the maritime statutes creating remedies for death and injury should be construed to include only remedies intended by Congress. See, *e.g.*, *Dooley* v. *Korean Air Lines*, 524 U.S. 116, 123 (1998) (Death on the High Seas Act (DOHSA) "expresses Congress's judgment that there should be no such cause of action [for pre-death pain and suffering] in cases of death on the high seas"); *Miles*, 498 U.S. at 29 (holding that enactment of the Jones Act precludes seaman from recovering for loss of society in a wrongful death action); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) (DOHSA action can not be supplemented with additional recovery for loss of society under general maritime law); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-156 (1964) (Jones Act precludes recovery under a state statute for wrongful death of a seamen due to unseaworthiness because Congress did not include that remedy in the Jones Act); *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930) (Jones Act preempts state law wrongful death action for person not a beneficiary under the Jones Act).

Similarly, the remedies recognized by statute in the Jones Act (and through FELA as incorporated into the Jones Act) do not support a claim for *any* type of damages; rather, the remedies include only those *measures* of damages contemplated by Congress. For

example, in a survival action created under the Jones Act, through the incorporation of FELA, "recovery is limited to losses suffered during the decedent's lifetime." *Miles*, 498 U.S. at 35 (citing *Van Beeck* v. *Sabine Towing Co.*,300 U.S. 342, 347 (1937); *St. Louis, I.M. & S. R. Co.* v. *Craft*, 237 U.S. 648, 658 (1915)).

3. Prejudgment interest is the type of legal remedy Congress contemplated and rejected for inclusion in the Jones Act and FELA when it enacted those statutes. In *Miles*, for example, the Court noted that Congress was aware of a pecuniary limitation on damages for loss of society under common law when it enacted FELA. "We assume that Congress is aware of existing law when it passes legislation," thus holding that "[t]here is no recovery for loss of society in a Jones Act wrongful death action." 498 U.S. at 32. Because Congress understood that prejudgment interest was not available at common law when it enacted the FELA, its incorporation of FELA into the Jones Act necessarily means that prejudgment interest may not be awarded under the Jones Act. See *Monessen*, 486 U.S. at 337. See also *Dooley*, 524 U.S. at 123 ("Because Congress has already decided these issues, it has precluded the judiciary from enlarging the class of beneficiaries or the recoverable damages.").

D. The Ninth Circuit's analysis is flawed

Although its discussion is cursory, the Ninth Circuit apparently views the availability of prejudgment interest as dependent on the nature of jurisdiction invoked by the plaintiff, and not on the substantive law of the Jones Act. That reasoning is flawed.

The court below (Pet. App. A2) rested its affirmance of the district court's award of prejudgment interest on prior Ninth Circuit decisions in *Simeonoff* v. *Hiner*, 249

F.3d 883, 893 (9th Cir. 2001), and *Vance* v. *American Hawaiian Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir. 1986). Those cases, however, rely on the rule allowing prejudgment interest under the general maritime law, which is distinguishable from the context of awarding prejudgment interest under the Jones Act.

Under admiralty law, an award of prejudgment interest is the general rule, "subject to a limited exception for 'peculiar' or 'exceptional' circumstances." *City of Milwaukee* v. *National Gypsum Co.*, 515 U.S. 189, 195 (1995). That case, however, does not provide support for the Ninth Circuit's view that prejudgment interest may *also* be awarded in a Jones Act case, even if that action is brought under the court's admiralty jurisdiction. In holding that the general rule of maritime law allowed an award of prejudgment interest for the maritime collision claim at issue, the Court in *City of Milwaukee* noted that Congress "has enacted a statute governing the award of postjudgment interest in federal court litigation, see 28 U.S.C. § 1961, [but] there is no comparable legislation regarding prejudgment interest." *Id.* at 194. As the Court explained, "the absence of a statute merely indicates that the question is governed by traditional judge-made principles." *Ibid.* The Court then cited *Monessen* as support for the proposition that a congressional statute would supplant "judge-made principles." *Ibid.*

The Court's decision in *City of Milwaukee* did not rest on the jurisdictional basis for the court's authority to render judgment, but rather on the underlying substantive law giving rise to the cause of action for damages. That conclusion derives from two points stressed by the Court. First, *City of Milwaukee* (515 U.S. at 194) cited *Monessen*, which itself was unequivocal that prejudgment interest is a question of substantive

law. See 486 U.S. at 334-336. Second, the Court's discussion of the reasons for permitting prejudgment interest in admiralty cases rests on the substantive principles of admiralty law and not its jurisdictional requisites. See 515 U.S. at 194 ("admiralty decrees have included provisions for prejudgment interest"); *id.* at 195 ("general rule that prejudgment interest should be awarded in maritime collision cases").

Thus, this Court's decisions establish that, even though prejudgment interest may be awarded when a claim arises under the substantive law of admiralty, see *City of Milwaukee*, 515 U.S. at 195, prejudgment interest may *not* be awarded when the claim arises under the substantive law of a statute that does not authorize an award of prejudgment interest, see *Monessen*, 486 U.S. at 336. The jurisdictional basis of the court's power to issue a remedial decree simply has no bearing on whether the substantive law authorizes an award of prejudgment interest.

II. STATE AND FEDERAL COURTS CONFLICT OVER WHETHER THE JONES ACT AUTHORIZES THE AWARD OF PREJUDGMENT INTEREST

A. The Ninth Circuit's decision conflicts with the decisions of other courts foreclosing prejudgment interest under the Jones Act

1. The Ninth Circuit's decision directly conflicts with the longstanding rule in the Sixth Circuit that, "[w]ith respect to Jones Act cases, this Court has noted that in a seaman's action to recover for personal injury or death, the general rule is that interest is awarded from the date that the damages have been judicially determined, and not prejudgment interest from the date of injury."

Anderson v. *Whittaker Corp.*, 894 F.2d 804, 808 (6th Cir. 1990) (internal quotation marks omitted). The Sixth Circuit has consistently applied that rule even when the Jones Act claim is brought under the court's admiralty jurisdiction. See *Oglebay Norton Co.* v. *CSX Corp.*, 788 F.2d 361, 362 (6th Cir. 1986); *In re United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970) (limitation of liability action brought in admiralty denying prejudgment interest for claimant's Jones Act claim); *Cleveland Tankers, Inc.* v. *Tierney*, 69 F.2d 622, 626 (6th Cir. 1948) (holding that the FELA rule that "an award of interest is not permitted prior to the judicial determination of damages * * * applies under the Jones Act"). Petitioner thus clearly would have prevailed if this case had been litigated in the Sixth Circuit.

2. After *Monessen*, a number of state courts have correctly analyzed the applicability of prejudgment interest as a question of substantive law, and not of the court's jurisdiction over the claim, and thereby held that prejudgment interest cannot be awarded in a Jones Act suit. In *Webster* v. *Oglebay Norton Co.*, 1995 Ohio App. LEXIS 238, at *19-*20 (Ohio App. 1995), for example, the Ohio court of appeals followed *Monessen* to hold that "the availability of prejudgment interest is a substantive matter governed by federal law" and "state courts cannot avoid the application of FELA [through incorporation into the Jones Act] by characterizing the state prejudgment statute as procedural rather than substantive." See also *Tio Mario, Inc.* v. *Matos*, 778 S.W.2d 529, 532 (Tex. Civ. App. 1989) (following *Monessen* to rule that trial court erred in awarding prejudgment interest under the Jones Act).

B. The jurisdiction-based approach has created conflicts among the federal courts on the applicability of prejudgment interest in Jones Act cases

1. The Fifth Circuit appears to be largely responsible for creating confusion on this issue by establishing a complex set of rules governing prejudgment interest that is triggered in part by the plaintiff's invocation of jurisdiction in Jones Act cases:

> Courts have generally recognized that the award of prejudgment interest may be appropriate in Jones Act cases tried in admiralty. *E.g., Sanford Bros. Boats, Inc. v. Vidrine*,412 F.2d 958, 972-73 (5th Cir. 1969). Further, when a Jones Act claim is tried jointly with a maritime claim before a judge, prejudgment interest may be awarded at the judge's discretion. *See Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1196 (5th Cir. 1982). It is equally well established in this Circuit that prejudgment interest is not available in Jones Act cases tried at law. *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972); *Vidrine*, 412 F.2d at 972-73.

Domangue v. *Penrod Drilling Co.*, 748 F.2d 999, 1000 (5th Cir. 1984) (per curiam). In articulating those "rules," however, the Fifth Circuit has not provided an explicable rationale for its holdings. Consequently, other courts have divided over the application of some of those rules, which has led to significant confusion among federal courts over when prejudgment interest may be awarded in a Jones Act suit.

2. Some courts hold that a seaman is not entitled to prejudgment interest in a Jones Act suit tried to a jury. See, *e.g.*, *Magee* v. *United States Lines, Inc.*, 976 F.2d 821, 822 (2d Cir. 1992); *Borges* v. *Our Lady of the Sea*

Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991); *Theriot* v. *J. Ray McDermott & Co.*, 742 F.2d 877, 883 (5th Cir. 1984). Those decisions appear to be based on a purported rationale that the plaintiff's request for a trial by jury negates his entitlement to prejudgment interest in a Jones Act suit. That explanation – that the case is being decided "at law" rather than "at admiralty," however, is merely a label for a result and not a coherent explanation of why the substantive law of the Jones Act logically depends on the forum where the case is tried.

Other courts – many from the same circuits as mentioned above – hold that prejudgment interest *is* authorized under the Jones Act when the suit is tried in admiralty. See, *e.g.*, *City of Boston* v. *S.S. Texaco Texas*, 773 F.2d 1396, 1401 (1st Cir. 1985); *Williams* v. *Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985) (stating that "it is well settled that in an action at law under the Jones Act, the recovery of prejudgment interest is not permitted, [but] the same rule does not apply to Jones Act cases brought under the court's admiralty jurisdiction") (citations omitted). Thus, in *Williams*, the court held that "when a Jones Act claim is brought under the court's admiralty jurisdiction, and hence the case is tried to the court and not to the jury, the allowance of prejudgment interest is within the discretion of the trial court even if there is not a finding of unseaworthiness." 750 F.2d at 491. See also *Williamson* v. *Western Pacific Dredging Corp.*, 441 F.2d 65, 67 (9th Cir. 1971). The Sixth Circuit rule conflicts with the holdings of those circuits and the court below (Pet. App. A2). See pp. 11-12, *supra*.

3. The inconsistency between those positions invites forum-shopping by plaintiffs and promotes confusion among courts, which exacerbates the difficulties of marine insurers and shipowners in allocating risks. In

suits with the types of claims brought by respondent in this case – a Jones Act claim and an unseaworthiness claim brought in the same action – two circuits hold that prejudgment interest is not permitted and one circuit holds that it is.

In *Wyatt* v. *Penrod Drilling Co.*, 735 F.2d 951, 953 (5th Cir. 1984), the Fifth Circuit explained that it was publishing its opinion "primarily to address * * * whether [the plaintiff] is entitled to prejudgment interest." Noting that problems were being "created by our somewhat conflicting precedents," *id.* at 956, the court in that case ruled that, when a plaintiff brings a case for Jones Act negligence and admiralty unseaworthiness, and the jury awards damages that cannot be differentiated between the two claims, a court may not award prejudgment interest, in view of the circuit rule "disapprov[ing] the award of prejudgment interest in a Jones Act tried to a jury," *id.* at 955. See also *Colburn* v. *Bunge Towing, Inc.*, 883 F.2d 372, 378 (5th Cir. 1989).

The Sixth Circuit, in this respect, is in accord with the Fifth Circuit. See, *e.g.*, *Anderson* v. *Whittaker Corp.*, 894 F.2d 804, 808 (6th Cir. 1990) (holding that because "[t]he jury's verdict does not disclose whether the damage award was based upon the Jones Act or upon the unseaworthiness claim" and "[w]here it is impossible to determine if the damages awarded relate only to the unseaworthiness claim, prejudgment interest will not be awarded at all") (quoting *Petersen* v. *Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 741 (6th Cir. 1986)).

In direct conflict with the Fifth and Sixth Circuits on this rule is the Second Circuit, which has held that when a plaintiff is awarded damages for a Jones Act claim along with an unseaworthiness claim, a court may award prejudgment interest. Indeed, the Second Circuit

has explicitly acknowledged a conflict on this issue. See, *e.g.*, *Magee*, 976 F.2d at 822 ("with all due respect for our learned colleagues in these two circuits [Fifth and Sixth], we reach a different conclusion in the instant case").[2]

4. The judicial confusion over when a court may award prejudgment interest for a Jones Act claim is compounded still further by the vagaries of litigation. A Fifth Circuit case illustrates the conundrums faced by injured seamen, shipowners, and insurers alike. In *Martin* v. *Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986) (per curiam), a dredging inspector was injured while stepping off a barge and onto a flatboat. After settling with one party, the plaintiff abandoned his original request for a jury trial. The case proceeded with findings of negligence and unseaworthiness against the inspector's employer and negligence against the flatboat operator. The court of appeals reversed as to employer's unseaworthiness and as to the flatboat operator's negligence, but affirmed on the employer's negligence

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[2] This Court's proper resolution of the question presented – whether a court may award prejudgment interest under the substantive law of the Jones Act – would also shed light on the proper rule to apply with respect to the unapportioned damages issue as well. If the Court were to rule, as petitioners and *amici* urge, that prejudgment interest may not be awarded under the Jones Act, there would be no legal basis for the Second Circuit's rule that such interest may be awarded when such an award is combined with a claim for unseaworthiness. See, *e.g.*, *Miles*, 498 U.S. at 24 (holding that, when the Jones Act addresses an issue, the general maritime law cannot provide a supplemental remedy as to that issue). Conversely, if this Court were to agree with respondent that the Jones Act permits prejudgment interest to be awarded, then the Fifth and Sixth Circuit rules prohibiting such interest in cases with combined Jones Act and unseaworthiness claims would be insupportable.

and remanded the case for reapportionment of fault and an appropriate reduction of the judgment. The remand order was silent as to prejudgment interest. *Id.* at 210. On remand, the district court found the liability for unseaworthiness and negligence to have been equal, dismissed the flatboat operator, and entered an award for damages and prejudgment interest against the seaman's employer. *Ibid.* On appeal again, the Fifth Circuit addressed only the issue of prejudgment interest. The court recalled its prior mandate, held that the plaintiff's decision to forego a jury trial in mid-litigation vested the district court with discretion to award prejudgment interest (as the case was now in admiralty), and then held that the district court had improperly awarded prejudgment interest as to future damages, which was not permitted under circuit law. *Id.* at 211-212. For the reasons stated above, however, that decision is incorrect. See pp. 5-11, *supra*.

A recent Second Circuit provides another illustration of how the vagaries of procedure have been held to affect the award of prejudgment interest. In *Jones* v. *Spentonbush-Red Star Co.*, 155 F.3d 587, 593 (2d Cir. 1998), the court upheld a district court's decision not to exercise its discretion to award prejudgment interest based on the delay of plaintiff in bringing the lawsuit – nearly three years after the injury but still within the statute of limitations period.

As the foregoing cases and those cited throughout Part II confirm, ship operators and their insurers face liability for prejudgment interest in Jones Act suits in some courts if the injured seaman (a) sues in admiralty; (b) abandons his request for a jury in mid-litigation and proceeds with an admiralty action; or (c) combines his Jones Act claim with an unseaworthiness claim and prevails on both. They do not face liability for

prejudgment interest in Jones Act suits in some courts if the injured seaman (a) sues in federal court and seeks a jury trial; (b) sues in state court under the Jones Act and invokes state procedural rules to obtain prejudgment interest; (c) delays too long in bringing suit; (d) sues in federal court on the law side, combines his Jones Act and unseaworthiness claims, and the jury cannot reasonably differentiate between the two in assessing damages; or (e) sues in the Sixth Circuit, where the court has properly held that prejudgment interest may not awarded under the Jones Act as a matter of substantive law.

That state of the law is flatly inconsistent with this Court's admonition that "prejudgment interest constitutes too substantial a part of a defendant's potential liability" to be left to the vagaries of a "rule of procedure." *Monessen*, 486 U.S. at 336. As the Fifth Circuit aptly put it, "[t]o make prejudgment interest depend on the route by which a plaintiff arrived in federal court is to confuse jurisdiction with remedy in a way no longer accepted in other areas of the law." *Snyder* v. *Whittaker Corp.*, 839 F.2d 1085, 1095 (5th Cir. 1988). This Court should grant certiorari to clarify the proper rule to be applied in Jones Act cases.

III. THIS CASE PRESENTS A RECURRING AND IMPORTANT ISSUE TO THE MARITIME INDUSTRY

A. There is no need for this Court to allow further "percolation"

As set forth in Part II, the conflicting approaches and confusion among the lower courts over when prejudgment interest may be awarded in a Jones Act suit are longstanding. The lower courts should have, but

did not, appreciate this Court's decision in *Monessen* as providing the requisite guidance. Numerous decisions after *Monessen* have continued to hew to the pre-existing circuit approaches. See, *e.g.*, *Simeonoff*, 249 F.3d at 894; *Jones*, 155 F.3d at 593; *Magee*, 976 F.2d at 822-823; *Borges*, 935 F.2d at 443 n.1; *Anderson*,894 F.2d at 808; *Jones* v. *Pool Offshore Co.*, 893 F.2d 713, 719-720 (5th Cir. 1990). Those decisions make clear that the prevailing circuit confusion is simply being entrenched or extended.

B. The issue is of great importance to the maritime industry

This Court has made clear that the Jones Act "establishes a *uniform* federal law that state as well as federal courts must apply to the determination of employer liability to seamen." *American Dredging*, 510 U.S. at 455 (emphasis added). That uniformity, which provides crucial assurance to the maritime industry, is completely unsettled by a legal regime that hinges the payment of awards for prejudgment interest on the vagaries of where a case arises, how a plaintiff invokes jurisdiction in the complaint, or how the case proceeds through litigation. The conflicting approaches of the Second, Fifth, Sixth, and Ninth Circuits embrace the major sea ports of the United States and river traffic along the Mississippi River.

Although the *amici* do not keep specific records on the amount of claims paid for Jones Act cases, they can represent to this Court that approximately 25 percent of all insured claims in any given year will be paid for crew member personal injuries, with a total exposure into the tens of millions of dollars annually. Interests represented by the *amici* thus face uncertain consequences on a large scale depending on where an

injured seaman might choose to bring suit. For many of the *amici* operating in the coastal trade and which routinely call into ports from different judicial circuits on the same voyage, that uncertainty creates an arbitrary and wholly irrational application of the law. Such uncertainty has particularly large consequences when, as this Court has recognized, "prejudgment interest may constitute a significant portion of [a Jones Act] plaintiff's total recovery" – as in *Monessen*, increasing the total recovery "by more than 20 percent." 486 U.S. at 335.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2001

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No. 01-756

Supreme Court, U.S.
FILED
DEC 29 2001

IN THE

Supreme Court of the United States

REGAL FISH LTD.,

Petitioner,

v.

JEFFREY P. FISH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a United States District Court sitting in admiralty may award prejudgment interest upon general maritime and Jones Act damages.

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STATEMENT OF THE CASE

An accurate statement of the case appears at pages A 1-3 (Opinion of the Ninth Circuit Court of Appeals) and B 1-10 (District Court's Findings of Fact and Conclusions of Law) of the appendix of Regal Fish LTD's petition.

REASONS FOR DENYING THE WRIT

The petitioner argues that the Court should reverse the prejudgment interest award finding that prejudgment interest is not available under the Jones Act, 46 U.S.C. App. § 688(a). The petitioner argues for that radical departure from the history of admiralty law on the grounds that prejudgment interest is unavailable under the Federal Employers Liability Act (FELA), under *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), and the Sixth Circuit disallows such awards, causing a division between the circuits. Neither of the petitioner's arguments has any merit.

Under Rule 17 of the Court, "[a] review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor." The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant review of the decision below. *In re Woods*, 143 U.S. 202, 206 (1982). For the reasons set forth below, the petitioner's petition is wholly without merit and does not meet the criteria guiding the Court's discretionary review. The petition should accordingly be denied.

A. The Instant Case, Which Involved Combined General Admiralty and Jones Act Claims, Does Not Contain Any Facts or Circumstances that Set it Apart from Other Maritime Cases or Otherwise Make It Suitable for Consideration of a Jones Act Issue.

This is a case in admiralty in which the Honorable Judge Thomas S. Zilly awarded Jeffrey P. Fish prejudgment interest on traditional maritime damages of maintenance, cure and past unearned wages, as well as general damages under the Jones Act, 46 U.S.C. App. § 688(a). The United States Court of Appeals for the Ninth Circuit affirmed the award, citing *Simeonoff v. Hiner*, 249 F.3d 883, 894 (9th Cir. 2001), *Vance v. Am. Haw. Cruises, Inc.*, 789 F.2d 790, 794-95 (9th Cir. 1986), *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985), and *Hillier v. S. Towing Co.*, 740 F.2d 583, 584 (7th Cir. 1984).

Contrary to the petitioner's argument, the decision below does not provide an ideal vehicle for the Court to address the petitioner's purported Jones Act issue. The petitioner is wrong in stating that "the sole issue at this stage of the proceedings is whether prejudgment interest is available under the Jones Act." (Pet. at 25). Mr. Fish's case, like the vast majority of seamen's claims, involved combined general maritime and Jones Act claims. Indeed, as this Court stated in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994): "for practical reasons, a seaman will almost always combine in a single action claims for relief under the Jones Act and general maritime law." 510 U.S. at 457. As such, the instant case falls squarely within the norm of seamen's personal injury claims. There is nothing distinctive about this case that would warrant review by this Court, nor does it present any unique circumstances for examining the Jones Act.

B. The Unavailability of Prejudgment Interest Under the FELA Does Not Alter the Authority of Courts in Admiralty to Award Prejudgment Interest Under the Jones Act.

In *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), the Court held that prejudgment interest is unavailable under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60. 486 U.S. at 336-339. The Jones Act incorporates the FELA by reference when it states that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in a seaman's personal injury action under the Act. 46 U.S.C. App. § 688(a); *Cox v. Roth*, 348 U.S. 207, 208 (1955).

The petitioner erroneously contends that under *Monessen*, prejudgment interest may not be awarded under the Jones Act. The petitioner's argument is contrary to opinions of this Court, as well as numerous opinions from every circuit court that has considered the issue of awarding prejudgment interest on combined general maritime and Jones Act claims.

Although the Jones Act has generally been interpreted to apply substantive provisions of the FELA, this Court has found substantive differences between the two statutes when applying the rules of the FELA "would frustrate the congressional purpose of 'the benefit and protection of seamen who are peculiarly the wards of admiralty.' " *Cox*, 348 U.S. 209, (finding survival of actions against deceased tortfeasors permitted under the Jones Act even though such actions are not provided for under the FELA) (citing *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) (holding that the FELA assumption-of-risk rule does not apply under the Jones Act)).

In *The Arizona*, this Court explained that the incorporation of the FELA into the Jones Act

> does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

298 U.S. at 209. The Court further noted that Congress intended for the Jones Act to provide for the welfare of seamen," and as such, "is entitled to a liberal construction to accomplish its beneficent purposes." 298 U.S. at 210.

Any uncertainty regarding whether there was a conflict between the FELA and the Jones Act on the issue of prejudgment interest has been resolved by this Court in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189 (1995). In that case, the Court acknowledged that there is no statutory prohibition against prejudgment interest in Jones Act cases and that "[f]ar from indicating a legislative determination that prejudgment interest should not be awarded, . . . the absence of a statute merely indicates that the question is governed by traditional judge-made principles." 515 U.S. at 194, (citing *Monessen*, 486 U.S. at 336-337 and *Rogers v. United States*, 332 U.S. 371, 373 (1947)). Those principles are well developed in admiralty, where "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies." *United States v. Reliable Transfer*, 421 U.S. 397 (1975).

One of the most fundamental "traditional judge-made principles" in admiralty law is that courts sitting in admiralty have the discretion to award prejudgment interest "to ensure that an injured party is fully compensated for its loss." *Milwaukee*, at 195. As the Court stated in *Milwaukee*, "[t]hroughout our history, admiralty decrees have included provisions for prejudgment interest." *Id.*, (citing *In Del Col v. Arnold*, 3 U.S. 333 (1796); *The Amiable Nancy*, 16 U.S. 546 (1818); *The Umbria*, 166 U.S. 404, 421 (1897); *The Anna Maria*, 15 U.S. 327 (1817); *The Manitoba*, 122 U.S. 97, 101 (1887)).

Lower courts have also looked to the history of maritime law to address prejudgment interest issues and focused on the fact that awards of prejudgment interest on general maritime claims were recognized under general maritime law long before the birth of the Jones Act. *See, e.g., Anglada v. Tidewater, Inc.*, 752 F. Supp. 722, 725 (E.D. La. 1990), (citing *The Scotland*, 118 U.S. 507, 518 (1886) (award of prejudgment interest within the discretion of the trial court); *The President Madison*, 91 F.2d 835 (9th Cir. 1937) (citing 19th century cases such as *The Amiable Nancy*, 16 U.S. 546 (1817), in support of its decision to award prejudgment interest); *Thompson Towing & Wrecking Ass'n v. McGregor*, 207 F. 209, 220-222 (6th Cir. 1913)).

The Court did not alter the course of that history when it decided *Monessen*, which strictly addressed the substantive provisions of the FELA. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court explained that in *Monessen* it disallowed prejudgment interest under the FELA "in large part because such interest was unavailable at common law when the FELA was enacted." 512 U.S. at 542. The Court thereby emphasized the importance of looking to

common law developments when determining the scope of a statute. The Court further stated that unless common law principles are "expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Id.* at 544.

As established in *Milwaukee* and *Anglada*, *infra*, the Jones Act stems from a rich common law history replete with prejudgment interest awards and explanations for their allowance. Over two hundred years of admiralty law history demonstrates that prejudgment interest has been consistently left to the discretion of the court when admiralty claims were tried to the court as in the instant case. There is no evidence that the Congress ever intended to remove this fundamental form of compensation from seamen when it passed the Jones Act for the specific purpose of fully compensating seamen for their losses.

In *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990), this precise analysis was employed by the Fifth Circuit when it considered the same question posed by the petitioner here. There, the vessel owner contended that the trial court erred in awarding prejudgment interest on the ground that the award was prohibited under *Monessen*, 896 F.2d at 968. The *Randolph* court determined that *Monessen* did not affect the long-standing rule that prejudgment interest is appropriate where general maritime actions and Jones Act damages are awarded by a court sitting in admiralty. *Id.* at 968-969. The *Randolph* court recognized that the Court in *Monessen* noted that neither the FELA nor the general federal interest statute makes any mention of prejudgment interest and that the Court relied on Congress' failure to amend the FELA to provide for prejudgment interest in the face of more than seven decades of judicial unanimity wherein state and federal courts have denied such prejudgment interest in the FELA

context. *Id.* (citing *Monessen*, 486 U.S. at 336-38.) The *Randolph* court then noted, by reference to prior Fifth Circuit opinions, that awarding prejudgment interest lies within the sound discretion of the trial judge, and in maritime law, granting the award is the rule rather than the exception. *Id.* (citing *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1042-43 (5th Cir. 1993)). Finally, the court found that "[b]ecause Congress has made no indication that prejudgment interest is inappropriate in maritime cases, the award is upheld as proper." *Id.*

C. The Sixth Circuit Allows Prejudgment Interest Awards When the Trial Court Sits in Admiralty and No Peculiar Circumstances Justify its Refusal – Thus, There is No Conflict Between the Circuits.

Huss v. King Co., Inc., 2001 U.S. Dist. LEXIS 19293 (Nov. 14, 2001), a seaman's general maritime and Jones Act claim for personal injuries sustained in the course of employment, is the Sixth Circuit's most recent treatment of this issue. The opinion in *Huss* demonstrates that it follows the approach of all other circuits, which find that prejudgment interest is available in Jones Act admiralty cases, which are tried to the court, absent "peculiar circumstances." *Id.*, at 54 (citing *Bush v. Diamond Offshore Co.*, 46 F. Supp. 2d 515, 523 (E.D. La. 1999) (allowance of prejudgment interest discretionary in Jones Act case tried to the court and not a jury)).

In considering the seaman's claim for prejudgment interest, the *Huss* court initially stated the often-cited rule of that jurisdiction that is emphasized by the petitioner:

> With respect to Jones Act cases in which a seaman is seeking recovery for personal injury or death,

> the general rule is that interest is awarded from the date that the damages have been judicially determined; there is no prejudgment interest from the date of injury.

2001 U.S. Dist. LEXIS 19293 at 53 (citing *Anderson v. Whittaker Corp.*, 894 F.2d 804, 808 (6th Cir. 1990), (citing *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 367 (6th Cir.), *cert. denied*, 479 U.S. 849, 93 L. Ed. 2d 109, 107 S. Ct. 173 (1986)). However, a close reading of *Huss*, *Andersen* and *Oglebay* reveals that the "general rule" referred to by those courts and the petitioner does not apply to Jones Act claims that are tried before the court rather than a jury.

With respect to the *Huss* opinion, after reciting the "general rule" above, the court went on to cite opinions of the Fifth Circuit and Second Circuit stating that awards of prejudgment interest on Jones Act claims were within the discretion of the trial courts:

> Moreover, even if prejudgment interest were available on plaintiff's past damages as a matter of law, *see Bush v. Diamond Offshore Co.*, 46 F. Supp. 2d 515, 523 (E. D. La. 1999) (allowance of prejudgment interest discretionary in Jones Act case tried to the court and not a jury), the court would be inclined to exercise its discretion to deny plaintiff this relief, insofar as plaintiff's actions in filing multiple lawsuits have caused the resolution of his claims to be delayed. *See Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 593-94 (2d Cir. 1998) (delay occasioned by plaintiff justified denial of prejudgment interest).

2001 U.S. Dist. LEXIS 19293 at 54. The *Huss* court then examined whether there were grounds for denying prejudgment

interest, applying the "peculiar circumstances" analysis adopted by the Fifth, Second and Ninth Circuits, and ultimately concluded that "Plaintiff's conduct, which has generated delay and confusion, renders him ineligible for prejudgment interest." *Id.* at 55.

Thus, although the *Huss* court reiterated the vague "general rule" denying prejudgment interest, it relied upon the Jones Act analysis followed by other circuits to explain its ultimate denial of the award. This demonstrates that when specifically addressing the factual circumstances such as those in the instant case, the Sixth Circuit denies prejudgment interest on Jones Act claims tried to the court only when "peculiar circumstances" exist that warrant denial of the award.

Furthermore, the cases cited in *Huss* as the source of the "general rule," *Andersen* and *Oglebay*, were not Jones Act cases tried to the court. *Andersen* involved only general maritime claims, for which the court awarded prejudgment interest. *Andersen*, at 809, n. 6 ("we need not decide the issue of the applicability of the distinction [between personal injury and property damage awards] to Jones Act cases because we do not have such a case before us.") Likewise, *Oglebay*, (which *Andersen* cites as its source of the "general rule") involved an indemnity claim that was tried to a magistrate, who awarded prejudgment interest. *Oglebay*, at 362. Those cases are therefore distinguishable from the instant case.

Indeed, the history of the Sixth Circuit's "general rule" denying prejudgment interest on Jones Act claims, upon which the petitioner heavily relies, shows that the rule predates the Jones Act and that its original source has been thoroughly distorted over time. The source of the "general

rule" language is *Great Lakes Towing Co. v. Kelley Island Lime & Transportation Co.*, 176 F. 492 (6th Cir. 1910). *Great Lakes* involved a "libel" action brought by a steam barge owner against a towing company that caused the barge to collide with a pier. In considering the barge owner's claim for prejudgment interest, the court stated the following:

> The general rule of law, or practice rather, is to allow interest in cases where the amount of damages is uncertain and is matter for proof, from the date when they were liquidated — that is, fixed by judicial ascertainment — which in this case would be the date of filing the commissioner's report. The date of filing the interlocutory opinion was a year earlier than that. Thus the libelant was allowed a year's interest more than the rate above stated would allow. **But the rule is not a fixed one, and is subject to variation by the circumstances. Its application rests in the discretion of the jury, or of the court where it stands in the place of the jury, and the exercise of this discretion will not be reviewed unless it has been palpably abused.** The facts of this case are such as to show that the action of the court was not inequitable. The case had been a long time pending, and many of the large items of damages were for definite amounts of expenditure which are not now disputed either in their amount or necessity. The fixing of the date of the interlocutory opinion was, in a large sense, somewhat compensatory for these considerations, and was not an abuse of discretion.

Great Lakes, at 499 (emphasis added).

This excerpt reveals that the "general rule" so often cited by the Sixth Circuit is derived from a case that (1) does not involve the Jones Act, (2) announced that prejudgment interest awards lie within the discretion of the trier of fact, and (3) actually awarded prejudgment interest. In light of this history, it is clear that any reliance on *Great Lakes* and its progeny for the proposition that prejudgment interest is prohibited under the Jones Act would be absurd.

Therefore, contrary to the petitioner's argument, the Court must conclude from *Huss* that the Sixth Circuit recognizes that prejudgment interest on past Jones Act damages may be awarded in cases tried to the court, unless peculiar circumstances justify its denial. Any Sixth Circuit case to the contrary, relying on the "general rule" derived from *Great Lakes*, must be deemed an anomaly that is in error.

CONCLUSION

For the foregoing reasons, Regal Fish LTD.'s petition for writ of certiorari should be denied.

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In The

Supreme Court of the United States

REGAL FISH LTD.,

Petitioner,

v.

JEFFREY P. FISH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Although petitioner and respondent disagree on the ultimate resolution of this case, they agree on a number of key points. Most significantly, the parties explicitly agree that prejudgment interest is not recoverable under the Federal Employers Liability Act ("FELA"), *see* Pet. 5-6; Br. Op. 3, and that the Jones Act incorporates FELA by reference, *see* Pet. 6-8; Br. Op. 3. Moreover, respondent implicitly accepts petitioner's explanation of the widespread jurisdictional conflict on this issue, Pet. 10-15. Finally, respondent does not challenge petitioner's statements that substantial confusion on this issue exists in the lower courts, *see* Pet. 12-15; *see also* Amicus Br. 11-18, that the jurisdictional conflict undermines uniformity and encourages forum shopping, *see* Pet. 20-22; *see also* Amicus Br. 14-15, 19, that the availability of prejudgment interest under the Jones Act is an important issue, *see* Pet. 22-24; *see also* Amicus Br. 19-20, and that the issue is ripe for review, *see* Pet. 27; *see also* Amicus Br. 18-19.

The parties appear to disagree on only two substantive legal issues. Respondent argues that the FELA rule announced in *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), does not apply in Jones Act cases. This argument, repeating the same mistake that a number of lower courts have made, confuses the court's jurisdictional basis for deciding a case with the substantive law that must be applied. Respondent also argues that the Sixth Circuit follows the same approach as other circuits in deciding prejudgment interest questions under the Jones Act. This argument ignores the Sixth Circuit's own decisions and misreads *Huss v. King Co.*, 2001 U.S.

Dist. LEXIS 19293 (W.D. Mich. Nov. 14, 2001) (No. 1:98 cv 366).

I. THE NINTH CIRCUIT HAS IGNORED THIS COURT'S RELEVANT DECISIONS CONCERNING THE PROPER INTERPRETATION OF THE JONES ACT

In the petition, we explained that Congress did not authorize prejudgment interest under FELA, *see* Pet. 5-6, and that the Jones Act incorporates FELA by reference, *see* Pet. 6-8. Respondent acknowledges these bedrock principles. *See* Br. Op. 3. He nevertheless contends that prejudgment interest is available in Jones Act cases decided in admiralty. Respondent seeks to rely on the *Cox-Arizona* exception to the general Jones Act rule, under which FELA doctrines are not incorporated in the Jones Act if it would be illogical to do so. (We described the *Cox-Arizona* exception more fully in the petition. *See* Pet. 7 n.2.) More specifically, he argues that the *Monessen* FELA rule should not apply in Jones Act admiralty cases because maritime law – in sharp contrast with the common law – has a long history of awarding prejudgment interest, and thus the *Monessen* rule is logically inapplicable in the maritime context. *See* Br. Op. 4-6.

Respondent's argument repeats the mistake of a number of lower courts. It confuses a court's jurisdictional basis for deciding a case with the substantive law that must be applied to resolve the parties' claims (regardless of the court's basis for jurisdiction). Whether a federal court sits at law or in admiralty is a jurisdictional

issue. *Compare* 28 U.S.C. §§ 1331-32 (granting law-side jurisdiction) *with* 28 U.S.C. § 1333 (admiralty jurisdiction). As this Court unanimously held in *Monessen*, prejudgment interest is a substantive issue. *See* 486 U.S. at 335-336. This Court sanctioned the award of prejudgment interest in *City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189 (1995), *not* because the district court was sitting in admiralty but because the cause of action arose under the substantive general maritime law. *See* Pet. 9-10; Amicus Br. 10-11.

To the extent that a claim arises under the general maritime law, *Milwaukee* would be relevant (except to the extent that Congress has altered the general maritime law by statute, *see* 515 U.S. at 194). But the only claim in controversy remaining in this case has nothing to do with the general maritime law. Respondent's unseaworthiness action (based on the general maritime law) failed. *See* Pet. App. B5, B8. Not only does petitioner acquiesce in the award of prejudgment interest under respondent's maintenance claim (also based on the general maritime law), petitioner has already made arrangements to pay that portion of the judgment that even arguably represents prejudgment interest on an award under the general maritime law. *See* Pet. 3 n.1. We anticipate that by the time this case is considered at conference, the only portion of the judgment remaining unpaid will be slightly more than $140,000 in prejudgment interest on that portion of the award that is indisputably based on the Jones Act – the only aspect of the award that petitioner disputes – and any postjudgment interest that may be due on this total.

The Jones Act does not build on the judge-made principles of the general maritime law. On the contrary, it represents Congress's decision to alter the general maritime law principles expressed in *The Osceola*, 189 U.S. 158 (1903), which held that an injured seaman has no negligence remedy against his employer. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990) (discussing the history of the Jones Act). As this Court explained in its first decision under the new statute, the Jones Act "brings into [maritime] law new rules *drawn from another system.*" *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 388 (1924) (emphasis added). That other system, of course, was FELA, which does not permit the recovery of prejudgment interest. The Jones Act simply does not build on the jurisprudence that respondent traces back to the eighteenth century.

Respondent's argument also misapprehends the significance of this Court's Jones Act jurisprudence. As we have explained, the *Cox-Arizona* exception is an exception to the general rule. *See* Pet. 7 n.2. Aside from his inapplicable historical argument, respondent offers no reason why the *Cox-Arizona* exception should apply here. The FELA rule denying prejudgment interest is neither logically limited to the railroad context nor logically inapplicable in the maritime context. On the contrary, this Court's most relevant decisions – those addressing the damages available under the Jones Act – have uniformly applied the FELA rules. *See* Pet. 8.

II. A WIDESPREAD CONFLICT EXISTS AMONG LOWER COURTS DEPENDING ON THE JURISDICTIONAL BASIS FOR THE SUIT

Respondent implicitly accepts petitioner's explanation of the widespread jurisdictional conflict on this issue, Pet. 10-15. Indeed, respondent endorses this jurisdictional conflict and adopts the argument for himself, asserting that a seaman *should* be entitled to different substantive remedies depending on a federal court's jurisdictional basis for deciding the case. *See* Br. Op. 5-7 (arguing that a federal court sitting in admiralty should be permitted to award prejudgment interest in Jones Act cases and distinguishing law-side cases).

III. THE FOURTH, FIFTH, AND NINTH CIRCUITS ARE IN CLEAR AND DIRECT CONFLICT WITH THE SIXTH CIRCUIT

Respondent argues that the Sixth Circuit is not in direct conflict with other courts of appeals because it does permit a district court to award prejudgment interest under the Jones Act when sitting in admiralty. Respondent cites no Sixth Circuit decision that supports his assertion, and he does not even attempt to distinguish *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (CA6 1948), and *In re United States Steel Corp.*, 436 F.2d 1256 (CA6 1970), *cert. denied*, 402 U.S. 987 (1971), the two Sixth Circuit decisions discussed in the petition in which the court expressly holds in admiralty actions that prejudgment interest is not available under the Jones Act. *See* Pet. 16. The present case is indistinguishable.

Respondent's heavy reliance on *Huss v. King Co.*, 2001 U.S. Dist. LEXIS 19293 (W.D. Mich. Nov. 14, 2001) (No. 1:98 cv 366), is misplaced, for the district court's decision fully supports petitioner's analysis. The *Huss* court, sitting in admiralty, summarily denied the plaintiff's request for prejudgment interest under the Jones Act by applying the Sixth Circuit's blanket prohibition. *See* 2001 U.S. Dist. LEXIS 19293, *53. The court then continued in *dictum* to explain that even if it followed the Fifth Circuit's rule, it would exercise its discretion to deny prejudgment interest on the present facts. *See* 2001 U.S. Dist. LEXIS 19293, *53-*55. There is no hint that the district court was gratuitously rejecting its circuit precedent to assert the discretion to award or deny prejudgment interest. The court simply said that even if it had the discretion (which it had stated in the previous paragraph that it did not), it would exercise that discretion to reach the same result.

IV. THE INTER-CIRCUIT AND JURISDICTIONAL CONFLICTS CREATE SERIOUS PROBLEMS FOR THE MARITIME INDUSTRY

Respondent does not challenge petitioner's explanation of why the jurisdictional conflict undermines uniformity and encourages forum shopping. His only response to petitioner's argument that the inter-circuit conflict also creates serious problems for the maritime industry is the assertion that no inter-circuit conflict exists. We address that argument in part III, *supra*.

V. THE DECISION BELOW CLEANLY RAISES AN IMPORTANT ISSUE THAT THIS COURT SHOULD RESOLVE

Respondent does not deny that the availability of prejudgment interest under the Jones Act is an important issue that is ripe for review. He simply objects that the present case is not a suitable vehicle for resolving this important issue. This objection is based on the fact that respondent sought to recover under both the Jones Act and the general maritime law. *See* Br. Op. 2.

Although it is true that respondent sought recovery under two theories, it is undisputed that his principal general maritime law claim (unseaworthiness) failed. *See* Pet. App. B5, B8. The successful maintenance claim represented such a small portion of the judgment that petitioner did not appeal the award of prejudgment interest on the general maritime law damages. *See* Pet. 3 n.1. As noted above, petitioner has already made arrangements to pay the entire judgment except that portion that indisputably represents prejudgment interest under the Jones Act. *See supra* at 3. The sole issue still in the case is thus the availability of prejudgment interest under the Jones Act.

Respondent's argument actually demonstrates that this is a particularly suitable vehicle for resolving the question presented. As respondent correctly notes, "the instant case falls squarely within the norm of seamen's personal injury claims." Br. Op. 2. He continues, "[t]here is nothing distinctive about this case . . . , nor does it present any unique circumstances. . . . " *Id.* By deciding this case, therefore, the Court could alleviate considerable

confusion in the lower courts precisely because the present action is so typical of so many seamen's personal injury claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

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